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No. 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WMCA, Inc., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLANTS

Opinions Below

The opinion of the three-judge district court dismissing the complaint (R. 294-323) is reported at 208 F. Supp. 368. The prior opinion of that court, also dismissing the complaint (R. 88-113), is reported at 202 F. Supp. 741. The prior opinion of this Court vacating that first judgment of dismissal and remanding the case for reconsideration in the light of *Baker* v. *Carr*, 369 U. S. 186, is reported at 370 U. S. 190.

Jurisdiction

On August 27, 1962, the three-judge district court entered an order and judgment dismissing the complaint which had sought to enjoin various state officials from performing functions in connection with state constitutional and statutory provisions alleged to be in violation of the Fourteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the district court on August 29, 1962 (R. 325-327). This Court noted probable jurisdiction on June 10, 1963 (R. 328), 374 U. S. 802. Jurisdiction of the Court rests on 28 U. S. C. 1253.

United States Constitution, Federal Statutes and State Constitution and Statutes Involved

The pertinent provisions of the United States Constitution; 42 U. S. C. Sections 1983 and 1988; 28 U. S. C. Sections 1343(3), 2201 and 2202; the Constitution of the State of New York, Art. III, Sections 1-5; and New York State Law, Sections 120-124, are set forth in Appendix A, *infra*, pp. 73-124.

Questions Presented

The legislative apportionment of New York State is determined by a formula contained in the state constitution and implemented by statutes. Application of that formula results, and must necessarily result, in gross and arbitrary disproportions between population and representation in both houses of the legislature and systematically discriminates against residents of the most heavily populated areas of the state.

Appellants sought to show that the apportionment formula was adopted with a deliberate purpose and intent to limit the representation of residents of the most

heavily populated areas of the state and that the resulting discrimination was therefore particularly invidious. Further, appellants offered to prove that as a result of the aforesaid malapportionment, appellants and others similarly situated are victims of economic discrimination and are deprived of due process of law. The district court rejected both offers as tendering irrelevant material. The State offered no evidence to justify the apportionment.

The questions presented are:

1. Whether the district court erred in dismissing the complaint on the ground that appellants had failed to prove that the apportionment is invidiously discriminatory.

2. Whether the district court erred in refusing to consider evidence offered to prove:

(a) that the apportionment formula was intended to discriminate against residents of the most heavily populated areas of the state because they were believed to be unworthy of an equal voice in the state government, where the complaint alleged that the apportionment results from affirmative legislative action violative of the Fourteenth Amendment;

(b) that appellants were denied due process of law because the malapportioned legislature unfairly discriminates against the residents of these underrepresented areas.

Statement

A) The Complaint

This action was brought on May 1, 1961 (R. 1), in the District Court for the Southern District of New York, under the Civil Rights Act, U. S. C., Title 42, §§1983 and 1988, and under U. S. C., Title 28, §1343. The individual

appellants are citizens and voters residing in the counties of New York, Bronx, Kings, Queens, Suffolk and Nassau. The appellant WMCA, Inc. is a New York corporation and a taxpayer having its principal place of business in New York County.[1] The suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and qualified voters similarly situated (R. 2-3).

The appellees are: the Secretary of State and Attorney General of the State of New York; the Commissioners of the Board of Elections of the City of New York; the Chairman of the Board of Supervisors of Nassau, Westchester and Suffolk Counties and the President of the City Council of the City of New York.[2] The complaint alleged that all of the appellees perform or will be required to perform official functions arising out of the legislative apportionment of the state and the conduct of elections pursuant to such apportionment (R. 3-4).

The complaint alleged that the appellants are denied due process and equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, by virtue of the provisions of the New York State Constitution and the statutes in implementation thereof which provide for an apportionment of the State Senate and Assembly in a manner which is discriminatory to the residents of the more populous areas of the state.[3]

1. The district court found it unnecessary to pass on the standing of WMCA, Inc. as a party plaintiff (R. 315).

2. Although nominally appellees, the officials representing the City of New York and Nassau County filed answers admitting the allegations of the complaint and associated themselves with the appellants in this action (R. 87; 116).

3. Although this suit was commenced some ten months prior to this Court's decision in *Baker* v. *Carr*, 369 U. S. 186, the allegations of the first cause of action of the complaint in this case substantially parallel those of the complaint in *Baker* v. *Carr*.

The complaint contained two causes of action, the first of which alleged (R. 1-10) that the formula contained in the state constitution (Art. III, §§ 2-5[4]) currently results in an apportionment which deprives appellants of rights guaranteed by the Fourteenth Amendment. The second cause of action (R. 10-11) alleged that those provisions of the state constitution were invalid and violative of the Fourteenth Amendment at the time of their adoption and that their adoption and the enactment in 1953 of statutes (N. Y. State Law, §§ 121 and 123) apportioning the legislature pursuant to said provisions constituted "affirmative legislative action" which deprived appellants of rights guaranteed by the Fourteenth Amendment.

The relief sought by the complaint (R. 11-12) was that the district court declare, pursuant to 28 U. S. C. § 2201, that Article III, §§ 2-5, of the Constitution of the State of New York; and New York State Law §§ 121 and 123, are void and invalid under the Fourteenth Amendment of the Constitution of the United States; that the appellees be restrained from acting pursuant to said provisions, and that the court retain jurisdiction of the case until the state legislature provides for such apportionment of the state as would insure to the appellants the rights guaranteed them by the Fourteenth Amendment.

B) The Prior Proceedings

On August 1, 1962, after this Court vacated the prior judgment of dismissal (370 U. S. 190), the district court held a hearing (R. 125) at which, at the outset, it rejected as irrelevant appellants' offers to prove that: a) the apportionment formula was specifically designed

4. Subsequent to the filing of this complaint, Art. III, §3 of the state constitution was amended in respects which are immaterial to this litigation. See App. A, *infra*, pp. 75-76, fn.

and intended to curtail the representation of residents of the most heavily populated areas of the state (R. 140, 142, 143-146); b) that the malapportioned legislature in fact discriminated against such residents in allocating tax revenues and distributing benefits (R. 140, 142, 147-148); and c) that a consensus of experts deemed population to be the only fair and equitable basis for apportionment (R. 129, 150).[5] Under these exclusionary rulings of the court, appellants were permitted only to introduce, and did introduce, evidence of the existing apportionment and the apportionment which must necessarily result when the mandatory formula contained in the state constitution is applied to 1960 citizen census figures. The appellees called no witnesses and offered no evidence to justify or rationalize the gross disparities which exist in both the Senate and Assembly between population and representation (R. 182-183; some facts were stipulated, R. 226-242).

C) The Opinions Below

Writing the principal opinion for the court, Richard H. Levet, District Judge, noted that "* * * we are unable to premise an invalidity of the provisions of the State of New York upon the *Baker v. Carr* determination by reason of the absence of applicable indicia" (R. 300). Judge Levet wrote that tests for invidious discrimination have been held to include such matters as rationality of state policy, historical basis, presence or absence of a political remedy, geography "including accessibility of legislative representatives to their electors" and whether the "court

5. The district court began the hearing by announcing its assumption that *no* evidence was to be presented. This was contrary to the assumption and desire of counsel for both the appellants and the State of New York (R. 128).

is called upon to invalidate solemnly enacted State Constitution and laws" (R. 304-305). Examining the New York apportionment by these tests, Judge Levet concluded that "plaintiffs have not shown by a fair preponderance of the relevant evidence that 'invidious discrimination' exists" (R. 314). In a separate concurring opinion, Chief District Judge Sylvester J. Ryan held that it was permissible for a state to base an apportionment on criteria besides population (R. 320-322). Judge Ryan wrote:

> "If apportionment were based solely on population, this would mean that 3% of the state's area would dominate the rest of New York. Even if the urban representatives were to sincerely endeavor to care for the interests of the state as a whole, it is unlikely that they might be able to fully understand the problems of the remaining vast areas of the state" (R. 322).

Judge Ryan did not discuss the converse problem, *i.e.*, the inability of the politically dominant rural minority fully to understand the problems of the urban majority, nor did he discuss appellants' rejected offer (R. 140, 142, 147-148) to prove that, in fact, the malapportioned legislature discriminates against such residents. Judge Ryan also agreed with Judge Levet's conclusion (R. 311-312) that a political remedy exists because, under the state constitution, a vote is held every twenty years on the question whether there shall be a constitutional convention. In 1957, a majority of those voting on the question, voted "No" (R. 322).

Circuit Judge Sterry R. Waterman noted his concurrence with the findings of fact and conclusions of law contained in the opinion of Judge Levet (R. 323).

Summary of Argument

I

A. The formulae contained in the New York State Constitution, pursuant to which both houses of the legislature are apportioned, produces and must necessarily produce gross and arbitrary disparities between population and representation. These disparities exist today to an extent never before experienced in the history of the state and, if present population trends continue, will become even more aggravated. New York's malapportionment cannot therefore be excused or tolerated on the basis of "history". Moreover, a complete historical analysis discloses that prior to the adoption of the current apportionment formulae in 1894 it was always a primary consideration that the representative districts should be as equal as possible with respect to the number of voters residing in each such district. Second, history discloses that the concept of one representative per county is not as rigid as defenders of the present system proclaim. Even today it is not applied with respect to Senate representation and with respect to representation of two counties in the Assembly. At other periods in the history of the state both the Senate and Assembly have been apportioned without the assignment of a representative to each county.

In 1894, however, a constitutional convention viewed with alarm the rapid population growth of certain downstate urban areas and adopted an elaborate apportionment plan which embodied a purposeful and systematic scheme of discrimination against residents of such areas. This plan still determines the apportionment of the state legislature.

B. The New York Senate is today apportioned by two different methods, one of which is applicable to counties having six percent or more of the state's citizen population and the other applicable to the balance of the counties. This formula is so contrived that the greater the population of a metropolitan county becomes the more over-represented the less populous counties become. The comparative power of voters in the counties with over six percent of the citizen population *decreases* as those counties' proportionate share of the state population *increases*; the comparative power of voters in the under-six-percent counties *increases* as those counties' proportionate share of the state population *decreases*.

The Assembly apportionment formula is less complex than the one for the Senate but is no less effective in producing rural over-representation. The number of Assembly seats is set at 150 which are assigned as follows: first every county (except one) is given one seat; next every county which has at least one percent of the state's citizen population is given an additional seat; finally all the seats left are divided among those counties which have at least one and a third percent of the state's citizen population. The effect of this process, as in the case of the Senate, is to separate the counties into different groups and to use different procedures for apportioning to each group, thereby automatically producing inequities. The basic inequity arises from the fact that so many seats (61 seats or 41% of the Assembly) are apportioned in the first step, in which population is not a factor at all, that there are not enough remaining to provide the heavily populated counties with a proportionate share.

C. (i) The district court concluded that New York's apportionment did not reveal geographical discrimination

—a conclusion which the court reached: 1) by comparing counties grouped in a manner which has no significance under the state constitution and which arbitrarily includes 4 over-represented counties with 6 under-represented counties discriminated against by the constitution; and 2) by comparing 1960 census figures with the apportionment based on the 1950 census rather than the reduced representation which the most heavily populated counties will receive when the reapportionment formula is applied to the 1960 census figures. In other words, because the legislature has not yet reapportioned on the basis of the current census, as under the state constitution it must do by 1967, and because the population of New York City relative to that of the entire state has declined, a temporary situation exists pursuant to which the discrepancies between that city's population and its representation are considerably less than they will be for the ensuing years following reapportionment.

(ii). The district court did not attempt to measure the extent of malapportionment by any of the various criteria recognized by political scientists and apportionment experts for these purposes. (The court deemed expert opinion on such matters to be entirely irrelevant.) Measuring the apportionment by these criteria reveals that:

(a) If reapportionment were carried out under the existing formulae Assemblymen representing no more than 37% of the citizens would constitute a majority in the Assembly, and Senators representing no more than 38% of the citizens would constitute a majority in the Senate.

(b) If the Assembly were reapportioned under the existing formulae the ratio between the most populous

Assembly district and the least populous such district would be at least 12.7 to 1. It is not possible now to calculate the precise Senate ratio but, because of various mandatory rules in the apportionment formulae, the ratio between the most populous and least populous Senate district cannot be less than 2.5 to 1.

(c) The relative voting power of voters in those New York counties with populations over 500,000, in 1960, was 86% of the state average. In 1960, the average voter in those New York counties with populations of 25,000 or less had a voting power which was 348% of the state average. In only five of all the other 49 states are counties with populations under 25,000 more over-represented than in New York.

(d) In terms of political representativeness, malapportionment has had a decisive effect in reducing the extent to which the distribution of seats in the legislature reflects the distribution of votes for candidates of the political parties on a statewide basis. It is a well known fact, mathematically demonstrable, that malapportionment has made the New York legislature "constitutionally Republican". As a consequence of the apportionment formulae, one political party has been able to perpetuate its majority position in the legislature even though its candidates frequently receive a minority of the votes. In this regard malapportionment effectively frustrates the political wishes of the majority much more severely than it does in those states in which a single party is dominant. Malapportionment causes New York to be a two party state with a one-party legislature.

(iii) Within the wide "verticle disparities" which exist between representation accorded to rural areas and that accorded the most heavily populated areas of the state,

there exist "horizontal disparities" among rural areas themselves as well as among urban areas themselves. New York's "crazy quilt" (*Baker* v. *Carr, supra* at 254) (concurring opinion of Mr. Justice Clark) is as erratic and irrational as the pattern disclosed in Tennessee. For example, within a single upstate county (Onondaga) two of the three Assembly districts each had a 1950 population of 83,613; the remaining Assembly district had a 1950 population of 167,726. These and similar variations are not the result of a rural-urban conflict but are purely the product of arbitrary, irrational and sometimes archaic apportioning and districting rules.

II

Purposeful systematic discrimination with respect to the exercise of the franchise—against a class of citizens fully qualified by the state's own standards to vote—is violative of the equal protection and due process clauses. Disparities between population and representation may result from the absence of any apportionment policy or reflect accidental circumstances such as population shifts without adjusting reapportionments. Such disparities may also result, however, not from accident but from design and reflect the implemented policy of a temporarily politically dominant group to perpetuate its control over the legislature by impairing the effectiveness of the exercise of the franchise by other groups. To a significant extent, New York's apportionment reflects arbitrariness and irrationality in the sense that accidental and unintended variations result from application of the apportionment formulae to the population figures of the state. But the consistent and ever worsening under-representation of the citizens residing in the more heavily populated areas of the state results, not primarily from accident, but from

a purposeful and intended scheme to suppress the voting rights of certain citizens on the basis of their place of residence.

We respectfully submit that affirmative legislative action intended to debase the votes of a class of citizens purely on the basis of place of residence calls even more impellingly for judicial intervention than does malapportionment by inertia—the situation presented in *Baker* v. *Carr, supra*. If this Court affirms the decision below, the result will be that a state cannot discriminate against voters on the basis of geography unless it really intends to do so. If, however, at any time in a state's history any group achieves, even temporarily, political dominance and succeeds in embodying in a constitutional provision a discriminatory apportionment formula explicitly intended to achieve the discriminatory result, the ensuing malapportionment would be immune from judicial challenge. We do not believe that the net result of the reappraisal of our systems of apportioning state legislatures occasioned by this Court's historic decision in *Baker* v. *Carr* will be that the equal protection clause prohibits invidious discrimination by accident, but permits such discrimination by design.

We believe that the full implications of the equal protection clause demand that the apportionment in both houses of the legislature be based on population, and we find support for this proposition in this Court's recent decision in *Gray* v. *Sanders*, 372 U. S. 368.

If within the state as a whole the concept of "one man—one vote" is mandatory, it is difficult to perceive how or why notions of inequality should be tolerated when the state is divided into political subdivisions. If in the election of the governor, everyone's vote must be equal (*Gray* v. *Sanders*)—in the election of the legislature—a

body which collectively constitutes a statewide authority, the same concept should prevail.

Apportionment on a population basis does not mean that all other factors are to be disregarded in determining the composition of the legislature. It does mean—contrary to the holding below—that population must be more than one of many equivalent factors in determining an apportionment. The use of other valid criteria—such as pre-existing political subdivisions—need not, and indeed must not, prevent the resulting districts from being approximately equal in population throughout the state; all other considerations must be subordinate to this requirement.

Mathematical exactitude is not required nor is it always feasible. The law has always recognized a concept of *de minimus*. Variations from population should be tolerated, however, only within a narrow range and only where they result from some rational policy permissible under the Fourteenth Amendment—the burden of justification of the variations resting with the state. The fact that such variations invariably operate to the detriment of one group of voters would make their existence particularly suspect; an explicit intent to deviate from a population base because of antipathy towards one class of citizens would render the apportionment invalid.

We respectfully urge that the requirement of a population base be recognized for both houses of the legislature and that this Court should reject as inapplicable the so-called "federal analogy", said by some to justify apportioning one house on some other basis. However, even if this Court were to accept some version of the "federal analogy", the constitutional provisions for apportionment of both the Senate and Assembly should be invalidated to permit the legislature to determine which house would be

the body to represent population and which house would be apportioned on some other basis. There is no clear dichotomy between the houses of the New York legislature today on this basis. Moreover, the composition of New York's bicameral legislature is a single complex interrelated problem, and, under the doctrine of separability the entire apportionment structure should be invalidated and referred to the legislature for revision. See *Sincock* v. *Duffy*, 215 F. Supp. 169, 188-189 (Del. 1963), *appeal pending*, No. 307, Oct. T. 1963, *sub nom*, *Roman* v. *Sincock*.

III

Following its decision in *Baker* v. *Carr*, this Court remanded this case to the district court (which had previously dismissed the complaint without a hearing) writing:

> "As in *Scholle* v. *Hare*, 369 U. S. 429, we believe that the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination". *WMCA, Inc.* v. *Simon*, 370 U. S. 190, 191.

We submit that this Court intended the burden of showing invidious discrimination to be a meaningful one which was capable of being met in circumstances not limited to the particular facts of the Tennessee case. But the district court did not rehear and reconsider this case in the manner contemplated by this Court's remand. Rather, by virtue of a series of erroneous rulings with respect to the presumption of constitutionality, the relevance of an intent to discriminate and the relevance of actual

economic injury resulting from malapportionment, the district court precluded a thorough inquiry into the constitutionality of New York's apportionment.

(a) The district court held that the appellants had the burden of proving the unconstitutionality of the apportionment provisions which had a presumption of constitutionality made all the stronger by virtue of their inclusion in the state constitution. The court also held that a showing of the extent of malapportionment did not establish either a *prima facie* case which the State must justify or rationalize; or a *per se* violation. These rulings were erroneous. Whatever procedural burdens appellants had, they more than met when the parties stipulated to the apportionment data of the state which disclosed gross disparities from population in both houses. Where basic civil liberties are involved the presumption of constitutionality shifts when a substantial question is raised as to the validity of the action of the state, taken in an area—unlike that of economic regulation—where the state power is not plenary but is severely circumscribed. Nor does inclusion of the apportionment formulae in the state constitution in any wise alter the basic question before the court or impose a greater burden on appellants. State action—be it in the form of a statute or a constitutional provision—or, as here, by both constitutional provision and statutory implementation,—must comply with the Fourteenth Amendment or be invalidated. When, therefore, appellants showed that malapportionment existed to the extent present in New York, they—at a minimum—established a *prima facie* case. Since the State offered no evidence to justify or rationalize the malapportionment, judgment should have been granted for the relief sought in the complaint.

(b) If the apportionment statistics alone were not sufficient to establish a *prima facie* case of invidious discrimination, it is appropriate to consider if any other evidence is relevant to show whether such discrimination exists. Appellants in fact sought to show that the apportionment violated the Fourteenth Amendment on two other grounds —(i) because it reflected intentional discrimination against a class of citizens thought, on the basis of place of residence, to be unworthy of an equal voice in the government of the state and, (ii) because it resulted in actual economic injury to members of that class.

(i) The district court excluded—not only from evidence but from its consideration—evidence that the purpose and intent of the apportionment formula was to discriminate against residents of the most populous areas of the state. In excluding such data as irrelevant the lower court ignored a long line of cases in which federal courts, including this Court, have looked to the "legislative setting" of enactments said to constitute discriminatory violations of civil liberties. See *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 53; *Davis* v. *Schnell*, 81 F. Supp. 873, 878 (S. D. Ala. 1949), *aff'd* 336 U. S. 933.

If in fact an intent existed to discriminate against certain residents, the adoption of the apportionment provisions and the statutes implementing them constituted, as alleged in the second cause of action (R. 10-12), affirmative legislative action in violation of appellants' constitutional rights (*cf. Gomillion* v. *Lightfoot*, 364 U. S. 339) —a contention entirely ignored by the district court. Moreover, as we have urged *supra*, if any variations between population and representation may be tolerated under the Fourteenth Amendment, it is surely relevant in determining the extent of the tolerable variations

whether they are the accidental product of an apportionment innocently devised or the calculated result of an intent purposefully and systematically to discriminate against a class of citizens.

Appellants primarily rely, in support of their allegations of an intent to discriminate, on the language and consequences of the apportionment provisions themselves. Reliance is also placed on the legislative history of the apportionment provisions, contained in records which may appropriately be judicially noted (See Appendix C, pp. 131-139). Appellants urge that, if this Court deems it relevant whether an intent existed to discriminate against a class of citizens, this Court should determine in the first instance whether such an intent existed and is manifested in the New York apportionment formulae. Otherwise, in evaluating the state's apportionment such an intent must be assumed to exist since the district court in effect ruled that even if such an intent were present, the apportionment would nevertheless be constitutional. Alternatively, the decision below should be reversed and remanded to the district court with instructions to adjudicate the question whether or not the apportionment is discriminatory in the light of all the facts and circumstances, including its "legislative setting" and the purpose and intent with which it was enacted and is implemented.

(ii) The district court also excluded both from evidence and from its consideration—as irrelevant—proof offered in support of the allegations of the complaint that a deprivation of due process and equal protection exists because the malapportioned legislature unjustly discriminates "against large segments of the population of the state in the allocation of the burdens of taxation and in

the unequal and unjust distribution of funds derived by the state through the exercise of the taxing powers" (Complaint ¶18, R. 9). This allegation and the tendered proof raised questions explicitly left open by this Court in *Baker* v. *Carr*, 369 U. S. at 194-195, fn. 15. We submit that it was error for the district court to deprive appellants of an opportunity to establish by this means both a violation of the due process clause and additional proof of invidious discrimination in violation of the equal protection clause.

Accordingly, if this Court should reject all other contentions of appellants, this case should be remanded to the district court with instructions to admit and consider the evidence excluded at the prior hearing and engage in the searching analysis of all aspects of the New York apportionment, which appellants submit, this Court contemplated when it previously remanded the case to the district court.

IV

Appellants lack any practical political remedy and the need for judicial intervention is as great here as in *Baker* v. *Carr* and *Gray* v. *Sanders*.

Although we do not concede that the existence of a political remedy would render a violation of the Fourteenth Amendment immune from judicial correction, we note that the New York Constitution contains no provisions for initiative and referendum and all efforts to obtain such a provision have been in vain. Constitutional amendments can be initiated only by the malapportioned legislature or by an almost equally malapportioned constitutional convention. A constitutional convention may not be held without the consent of the legislature prior

to 1979. Even if such a convention were held, almost all of the delegates would be elected on the basis of Senate districts; therefore, such a convention would itself be infected by the same malapportionment which obtains in the Senate. The rejection by the voters of a convention call in 1957 cannot be said to reflect a popular acceptance of the present apportionment formula in view of the nature of the question as presented to the voters and the many other issues injected into the campaign. In fact, all efforts to achieve political redress for the long-standing grievances of which appellants complain have failed. We are at the end of the line. Only this Court can restore majority rule to the 17,000,000 inhabitants of New York State.

ARGUMENT

I. The Apportionment of the New York State Legislature; The Causes and Extent of Malapportionment in Both Houses of the Legislature.

The apportionment of both houses of the New York State legislature is determined by a complex and arbitrary formula, embodied in the Constitution, which formula must be applied every ten years to the current census figures to determine the legislative apportionment of the state.

We set forth herein:

(A) the history of apportionment in New York prior to the adoption, in 1894, of the present formula.

(B) the apportionment formula itself and how it operates.

(C) the net results, *i.e.*, the extent and nature of the malapportionment.

A. The History of Apportionment in New York Prior to 1894.

New York State today is malapportioned to a greater extent than at any time in its history. If the state should be reapportioned on the basis of the present formula and the 1960 federal census figures, the extent of malapportionment would substantially increase (Pls. Exs. 1-7; R. 159, 243-249). If present population trends continue the malapportionment will become even more aggravated. Thus, the relevance of past practices here is extremely questionable for disparities such as now exist have never before occurred or been sanctioned in New York. The district court found, however, historic justification for the current malapportionment which it said was "fitted to the nature of the governmental development of the Empire State" (R. 311). We examine the validity of that conclusion in material set forth in Appendix B (*infra*, pp. 125-130) in which the predecessor apportionment formulae are traced and analyzed.

From that analysis, two salient facts emerge. The first is that it was always a primary consideration that the representative districts should be equal (insofar as the relevant districting rules permitted[6]) with respect to the number of the voters residing in each such district. However, under the first three constitutions (and unlike the 1894 constitution which merely pays lip service to this concept of numerical equality[7]), this goal was, to a large

6. Apportionment rules relate to the allocation of representatives to previously described districts. Districting rules relate to the determination of the boundaries for the districts to which such representatives will be allocated.

7. Although the current constitutional apportionment formulæ speak of Senate districts to contain "as nearly as may be an equal number of inhabitants" Art. III, §4, and a like provision exists with respect to the Assembly, Art. III, §5, other provisions of the formulæ effectively preclude realization of these stated objectives. See pp. 25-31, *infra*.

extent achieved. This resulted from the apportionment rules themselves as well as the fact that earlier apportionments were made at a time when there was a more uniform population dispersal throughout the state.

Second, this historical summary discloses that the concept of one representative per county in one house is not as rigid as defenders of the present system proclaim. Even today it is not applied with respect to Senate representation and with respect to representation of Fulton and Hamilton counties in the Assembly. At other periods in our history, both the Senate and Assembly have been apportioned without assignment of a representative to each county. In fact, the rule of one Assemblyman per county did not go into effect until 1821, 44 years after the first constitution.[8]

Thus, in New York State past practice does not justify or excuse gross malapportionment. Nor does history nationally justify or excuse malapportionment in any state.[9]

Finally, although the present formula dates back to 1894, it can hardly be contended after *Brown* v. *Board of Education*, 347 U. S. 483, 492, and *Gray* v. *Sanders*, 372 U. S. 368, that a violation of constitutional rights becomes sanctified merely because of the passage of time during which corrective efforts have been to no avail; *cf. Fairbank* v. *United States*, 181 U. S. 283. "The equal protection clause should be read in the present tense . . ." McKay, *Political Thickets and Crazy Quilts:*

8. See App. B, *infra*, pp. 127-128.

9. Studies made by the National Municipal League disclose that when the Union was formed all but four states created legislatures in which population was given preponderate consideration in both houses. During the first century of our national existence, population equity was the main criterion for apportionment in 30 of the 36 states.

Reapportionment and Equal Protection, 61 MICH. L. REV. 645, 697 (1963).

B. The Present Method of Legislative Apportionment.

(1) *Introduction.*

The tremendous population growth which New York City (then New York and Kings Counties) was experiencing was of great concern to the majority of the delegates to the 1894 Constitutional Convention and led to the adoption of apportionment rules designed to suppress the number of Senators and Assemblymen to be apportioned to heavily populated areas.[10]

We summarize, in this section the specific rules which govern the legislative apportionment of the state, and analyze the extent to which the necessary consequence of these rules is consistent discrimination against the most populous counties of the state.

The legislative power of the State of New York has always been vested in a two-house legislature composed of the Senate and the Assembly.[11] Since adoption of the constitution in 1894, apportionment of the members of the Senate and Assembly has been effected in accordance with rules prescribed in that constitution. See N. Y. Const., Art. III, §§2-5. This method of apportionment

10. See Appendix C *infra* pp. 131-139. The rules designed to limit representation from such areas (*e.g.*, the full ratio rule and the provision for increasing the size of the Senate (see pp. 26-30, *infra*)) are entirely independent of the districting rules to prevent gerrymandering which the convention also adopted. It cannot be doubted that the convention could have dealt with the gerrymandering problem without imposing inequities with respect to urban representation.

11. See App. B, *infra*.

has continued substantially unchanged to the present time.[12]

The 1953 apportionment is now in effect in New York State. Subject to the outcome of this appeal, the New York State constitution requires that a new legislative apportionment be effected before 1967, on the basis of the 1960 federal census figures. In the ten-year period from

12. In 1931, provisions with respect to use of the federal census to determine population were added by amendment to Article III, §§4 and 5. By amendment adopted in 1945, minor substantive changes were made to facilitate the creation of Senate districts and Assembly districts within certain counties. See Article III, §4, Par. 1, §5, Par. 4. In addition to prescribing the method of apportionment, the 1894 constitution itself made an apportionment of the legislature, which was superseded by subsequent apportionment statutes. These obsolete provisions for apportionment of the Assembly were deleted from Article III, §5 by the 1931 amendment. See New York State Constitutional Convention Committee, Vol. II, Amendments Proposed to New York Constitution 1895-1937, pp. 184-187 (1938). The corresponding provisions of Article III, §3, with respect to the 1894 apportionment of the Senate were deleted by the amendment approved in November, 1962. See App. A, *infra*, p. 76n. All apportionments since the apportionment made in the 1894 constitution have been made by statute.

Although the New York constitution has required that an apportionment of the legislature be made once every ten years, see N. Y. Const. Art. III, §4, par. 1, §5, par. 1, the legislature has enacted an effective apportionment statute on only four occasions since 1894: in 1907, 1917, 1943 and 1953. See Laws 1907, c. 727; Laws 1917, c. 798; Laws 1943, c. 359; Laws 1953, c. 893. Apportionment statutes enacted in 1906 and 1916 were held invalid by the New York Court of Appeals as not in compliance with the method of apportionment prescribed in the constitution. See *Matter of Sherrill v. O'Brien*, 188 N. Y. 185 (1907); *Matter of Dowling*, 219 N. Y. 44 (1916). The validity of the apportionment statute enacted in 1907 was challenged in 1911, but the Court of Appeals refused to pass on its constitutionality because of the objector's laches in waiting until after four elections had been held. See *Matter of Reynolds*, 202 N. Y. 430 (1911). The validity of the statute enacted in 1943 was sustained in *Matter of Fay*, 291 N. Y. 198 (1943).

We submit that this record of the inability of the legislature to comply with the terms of the apportionment provisions is itself indicative of the complexity and irrationality of the apportionment formula.

1950 to 1960 the population of New York State increased from 14,203,449 to 16,240,786.[13]

The New York State constitution provides that each Senate district "shall contain as nearly as may be an equal number of inhabitants, excluding aliens," N. Y. Const. Art. III, §4, par. 1, and that the members of the Assembly shall be apportioned among the several counties of the state "as nearly as may be according to the number of their respective inhabitants, excluding aliens." *Id.* §5, par 1.

The county is the basic unit of area for the purpose of apportioning both the Senate and Assembly. No county may be divided in forming a Senate district, except to make two or more districts wholly within the county. *Id.* §4, par. 1. Assemblymen are apportioned by counties, *Id.* §5, the exception being that two upstate counties, Fulton and Hamilton, are treated as a single county in apportioning the Assembly, *Id.* §5. There are 62 counties in the state.

The number of Senators is fixed at not less than 50 and may vary with each apportionment. *Id.* §2, §4, par. 3. In the 1953 apportionment it was 58; in the pending apportionment based on the 1960 census it will be 57. The number of Assemblymen is fixed at 150. Both Senators and Assemblymen are elected for two year terms, in the even-numbered years. *Id.* §2.

The method of apportionment prescribed in the New York State constitution results and has resulted, in a substantial impairment of the voting power of the most populous counties in both the Senate and Assembly and in every apportionment, primarily because the legislature in making an apportionment is required by the constitution to

13. R. 227-229. All population figures used herein refer to citizen population unless otherwise indicated.

apply certain rules the inevitable effect of which is to limit the representation of those counties. We outline below the rules for apportioning the Senate and the Assembly, with emphasis on those rules which limit the representation of the most populous counties.[14]

(ii) *The Senate Apportionment Formulae.*

For Senate apportionment, the counties are divided into two categories: those which have more than 6% of the state's citizen-population and those which have less. Different procedures determine the number of seats apportioned to each group.

The seats are apportioned as follows:

First, the state's citizen-population is divided by 50. The resulting number is called the first ratio. All counties with citizen-populations at least three times this ratio (that is, at least 6% of the state's citizen-population), are assigned seats by comparing their citizen-populations to the first ratio. These counties are referred to as the "first-ratio counties". Counties with citizen-populations between three and four times the ratio receive three seats; those with populations between four and five times the ratio receive four seats, and so on.

Next, the number of seats given each first-ratio county is compared to the number it had in 1894. If any of these counties has more seats than it had in 1894, the total Senate membership is increased by the same number of additional seats. (Thus, if a county that had two seats in 1894 were given seven under a new apportionment, it

14. A more detailed exposition of the operation of these rules will be contained in the brief of the Corporation Counsel of the City of New York (hereinafter referred to as the "City's Brief"). See also Silva, *Apportionment in New York*, 30 FORD. L. REV. 581 (1962); Silva, *Apportionment of The New York Assembly*, 31 FORD. L. REV. 1 (1962); Wells, *Legislative Representation in New York State* (published by the I.L.G.W.U. March, 1963).

would cause Senate membership to increase by five seats over the basic 50.)

After this process is completed, the remaining seats are divided among the counties which have less than 6% of the citizen-population. To apportion these seats, a second ratio is used—obtained by dividing the combined citizen-population of all the under-6% counties by the remaining number of seats (including the newly-created ones). These seats are then distributed on the basis of this second ratio. (The second ratio is not specifically established by the Constitution but is made necessary by its limitations and by subsequent judicial interpretation of the 1894 Constitutional formula.)

If the present formula is again used to reapportion the Senate, the procedure will operate in the following way:

The first ratio will be 324,816. Three times this figure (that is, 6% of the state's citizen-population) is 974,448. There are six counties whose citizen-populations exceed this figure: Kings, Queens, New York, Bronx, Nassau and Erie. These, then, will be the "first-ratio counties". (Nassau will be in this category for the first time.)[14a]

In comparing the number of seats for which each of these counties qualifies to the number it had in 1894, New York and Bronx are considered to be one county since they comprised a single county in 1894. For the same reason, Queens and Nassau Counties are considered together.

The comparison will run as follows:

Both Kings and Erie will have the same number of seats they had in 1894: seven and three respectively. Therefore neither will affect the total number of Senators.

New York and Bronx together had twelve seats in 1894 and will receive four each under a new apportionment—

14a. See Brief of Eugene H. Nickerson, Chairman, Board of Supervisors, Nassau County, Appellee, in support of Appellants, for a detailed analysis of the impact of malapportionment on Nassau County.

a total of eight. Such decreases do not change the total number of Senators, so neither county will affect the size of the Senate.[15]

In 1894, Queens, which then included Nassau, had one seat. Under the new apportionment, Queens will get five and Nassau three—a total of eight. This is an increase of seven over 1894; consequently, seven Senate seats will be added to the basic 50 to produce a 57-member Senate.

The six first-ratio counties, then, will receive a total of 26 Senate seats. Subtracting 26 from 57 will leave 31 additional seats to be divided among the remaining counties on the basis of the second ratio. (The second ratio will be 216,822.)

The 26 Senators from the first-ratio counties will represent 9,519,000 people—59% of the state's citizens; the 31 Senators from the second-ratio counties will represent only 6,721,000 people—41% of the citizens. A minority of the people will thus elect a majority (54%) of the Senators.

There will be 366,000 citizens per Senator in the first-ratio counties; in the second-ratio counties there will be 217,000 per Senator. The system actually sets up a mathematical "double standard" under which the citizens of the first-ratio counties are, in effect treated as "second-class citizens." Their seats will be apportioned on the basis of a Senate of 50 members while the other counties' seats will be distributed on the basis of a Senate of 57 members, thus giving a clear advantage to the latter group. If this "two-ratio system" did not exist, there would not be 31 seats left for the less heavily-populated counties, but only 24.

Each time a first-ratio county becomes entitled to a greater share of the original 50 seats than it had in 1894,

15. For a further discussion of the effect of the rule with respect to such decreases, see City's Brief, p. 28.

the number available for the other counties would have to be reduced if the constitutional machinery did not create extra seats. In this way, the additional seats gained by the heavily-populated counties since 1894 do not result in a corresponding reduction of seats for the smaller counties—this despite the fact that the smaller counties' proportionate share of the state's citizen-population has actually decreased. Population increases by the over-6% counties actually cause the under-6% counties to become more over-represented. Indeed, the complex Senate apportionment formula produces the following rather startling "equations": the comparative power of voters in the first-ratio counties decreases as those counties' proportionate share of the state population increases; the comparative power of voters in the second-ratio counties increases as those counties' proportionate share of the state population decreases.

Although it is the most important one, the two-ratio system is not the only inequity in the Senate apportionment process. Another stems from a requirement that to qualify for additional seats beyond three, counties must have additional full first ratios. This requirement has become known as the "full ratio" rule. There is no similar requirement for second-ratio seats. For example, in the coming reapportionment, Nassau can be given no more than three seats although its citizen-population is just a shade less than four times the first ratio (3.93). By contrast, in the last apportionment, Onondaga, whose citizen-population was just 1.71 times the second ratio, was given two seats, and under a new apportionment, Monroe would be given three seats although its citizen-population is only 2.63 times the second ratio. (Monroe's population is just 1.76 times the first ratio.)

The combined effects of the two-ratio system and the "full ratio" rule in the Senate apportionment system will deprive the first-ratio counties of eight Senate seats. If seats were distributed in direct proportion to each county's citizen-population, these counties would receive 34 seats in a 57-member Senate, but under a new apportionment they would get only 26.

(iii) *The Assembly Apportionment Formula.*

The Constitutional formula for Assembly apportionment is less complex than the one for the Senate but is no less effective in producing urban under-representation.

The number of Assembly seats is set at 150; these are distributed among the counties in the following three-step process:

(1) First, every county (except Hamilton) is given one seat.

(2) Next, every county which has more than one percent of the state's citizen-population is given an additional seat.[16]

(3) Finally, all the seats still left are divided among those counties which have more than one and a third percent of the state's citizen-population.[17]

16. Art. III, §5 speaks of assigning a second Assemblyman to every county having "more than the ratio and one-half over". A ratio is determined by dividing the citizen population of the State by the number of members of the Assembly (150). 1½ times $\frac{\text{population}}{150} = 1\%$ of population.

17. Art. III, §5 speaks of counties having "more than two ratios." Two ratios = 2 times $\frac{\text{population}}{150} = 1\frac{1}{3}\%$ of population. The specific number of Assembly seats assigned to each of those counties whose citizen-populations exceed one and a third percent of the state's citizen-population is determined by a formula under

The effect of this process is to separate the counties into three groups: those with small, medium sized and large populations. The number of seats apportioned to each group is determined by a different step in the procedure and inequities are thereby automatically produced. The basic inequity arises from the fact that because 61 seats (41% of the total number) are apportioned on the first step, without any regard to population, not enough remain to provide the heavily-populated counties with an equitable share.

The inequalities inherent in this system may be gauged from examination of the results it will yield if it is again used to reapportion the Assembly: the heavily-populated urban and suburban counties will receive, on the average, one seat for every 130,000 citizens; the medium-sized "two-Assemblyman counties" will have an average of one seat for every 110,000 citizens; the remaining "one-Assemblyman counties" will average one seat for every 63,000 citizens.

C. The Nature and Extent of Malapportionment.

(i) *Geographical Discrimination.*

The court below concluded that the New York apportionment did not disclose "geographical discrimination" (R. 314). This conclusion was based, in part, on a comparison of counties grouped in a manner which has no significance under the state constitution.

The district court relied upon figures for ten counties. Under the state constitution, the full ratio rule and the rule for expansion of the Senate of which appellants

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which the total number of seats available to these counties as a group are distributed among them on a reasonably equitable basis. The major inequity in Assembly representation arises from the fact that as a group these counties do not receive a sufficient number of seats to enable them to be equitably represented.

particularly complain (Complaint, ¶13, R. 6), apply only to six counties (R. 172-173). A comparison based on those six counties discloses that the extent of actual malapportionment is much greater than the court's opinion would indicate.[18] The four additional counties reflected in the district court's comparisons will all be over-represented in the Senate.

The court also judicially noted (R. 297, par. 5) figures which compare New York City's 1960 population with its representation based upon the 1950 census, rather than the reduced representation which will result and control for the coming years when the challenged reapportionment formula is applied to the 1960 census figures. In other words, because the legislature has not yet reapportioned on the basis of the current census, as under the state constitution it must do by 1967, and because the population of New York City relative to that of the entire state has declined, a temporary situation exists pursuant to which the discrepancies between the city's proportion of its states' population and its share of the seats are considerably less than they will be for the ensuing years following reapportionment.

The fact of the matter is that, measured by standards which are generally recognized by political scientists for these purposes,[19] New York's apportionment reflects severe geographical discrimination—particularly when it is borne in mind that New York State's total citizen population is more than 16,000,000 and that therefore each percentage point of deviation from representation propor-

18. See Pl.'s Exs. 1-5, R. 159, 243-247.

19. The court below did not deem expert opinion relevant and did not discuss any of these standards (See R. 149-150, 182). With respect to consideration of expert opinion, compare *Sincock* v. *Duffy*, *supra*; *Moss* v. *Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962).

tionate to population equals at least 160,000 citizens. We analyze the New York apportionment by these recognized criteria:

(a) PERCENTAGE OF POPULATION WHOSE REPRESENTATIVES CONSTITUTE A MAJORITY (calculated by adding the populations of the districts, starting with the least populous, until the number of districts added represents a majority of the members of the house).[20]

When, in 1953, New York was reapportioned on the basis of the 1950 census, Assemblymen representing 37.1 percent of the citizens constituted a majority in the Assembly and Senators representing 40.9 percent of the citizens constituted a majority in the Senate.

If reapportionment were carried out under the existing constitutional formula, Assemblymen representing no more than 37% of the citizens would constitute a majority in the Assembly, and Senators representing no more than 38% of the citizens would constitute a majority in the Senate.

In the study, "State Legislative Redistricting" (Public Administration Service, University of Virginia, September 10, 1962), Professors Paul T. David and Ralph Eisenberg state (at page 17) that, in their opinion, in a legislature where less than 45% of the population have the power to elect the majority in one house of the legislature "it can be suspected there is substantial room for improve-

20. This criterion is discussed and figures for the various states are indicated in Dauer and Kelsay, *Unrepresentative States*, NATIONAL MUNICIPAL REV., Dec. 1955, pp. 571-575 and 587. Corrections appear in the National Municipal Review for April, 1956. See also David and Eisenberg, *Devaluation of the Urban and Suburban Vote*, Bureau of Public Administration of the University of Virginia, (1961). More recent figures appear in the "Compendium on Legislative Apportionment" published by the National Municipal League (2d edition, Jan. 1962).

ment in achieving reasonable equality of representation in the districting plan." The percentages in New York fall far short of this figure and create more than a "suspicion" that improvement is needed.

(b) EXTREMES (expressed as a ratio—the population of the most populous district divided by that of the least populous:)[21]

When, in 1953, the state was reapportioned on the basis of the 1950 census, the most populous Assembly district had 11.9 times as many citizens as the least populous Assembly district and the most populous Senate district had 2.4 times as many citizens as the least populous Senate district.

If the Assembly were reapportioned under the existing constitutional formula, the most populous Assembly district would have at least 12.7 times as many citizens as the least populous Assembly district. (It is not possible now to calculate precisely what the ratio of the population of the most populous Senate district would be to the population of the least populous Senate district if the Senate were reapportioned under the existing constitutional formula, but, because of the various mandatory rules in that formula the ratio can be no less than 2.5 to 1.)

(c) RELATIVE VOTING POWER OF VARIOUS CATEGORIES OF COUNTIES (100% represents the average power of a vote for the entire state, and other figures indicate the variation from this average: Thus, voters, in an under-represented area might have a voting power of, say, 75%; those in an over-represented area might have a voting power of

21. For comparative figures in other states, see, "Compendium on Legislative Apportionment" (2nd edition), and the University of Virginia study. See fn. 20 *supra*.

200%. The figures used are averages for both houses).[22]

(i) Under-Represented (heavily populated) Counties

In 1950, the average voter in those New York counties with populations over 500,000 had a voting power which was 84% of the state average. In 1960, this percentage became 86%.

(ii) Over-Represented (sparsely populated) Counties

In 1950, the average voter in those New York counties with populations of 25,000 or less had a voting power which was 319% of the state average. In 1960, this percentage was 348%.

In only 5 of all the other 49 states are counties with populations under 25,000 more over-represented than in New York. (California, Arizona, Florida, Maryland and New Jersey.) Thus, New York ranks as the sixth worst state in terms of rural over-representation.[23] (Rural over-representation is particularly marked in the Assembly. For example, in the pending apportionment counties in the under-25,000 category which have a combined population of only 79,000 will elect 4 Assemblymen, whereas in Kings County, districts with a combined population of 719,000 will also elect 4 Assemblymen.)

22. The figures contained in this section appear in the University of Virginia study, *op. cit. supra* fn. 20, at p. 50. Comparable figures for the percentages which will result following reapportionment are not available.

23. "All states except New Jersey and Rhode Island display increasing over-representation of rural counties since 1910. In most, the trend has been one of consistently increasing over-representation during the 50-year period. California, Maryland, New York, New Jersey, Pennsylvania, Massachusetts, Florida, Connecticut, and Arizona provide instances of the greatest over-representation following the 1950 census despite any reapportionments. In 1960, before reapportionment or redistricting, the most extreme instances of over-representation existed in California, Arizona, Florida, Maryland, New Jersey, New York, and Pennsylvania * * *." University of Virginia study, *op. cit. supra* fn. 20, at p. 14.

(d) POLITICAL REPRESENTATIVENESS. Finally, it is unrealistic to attempt any statistical analysis of the malapportionment of the New York State legislature without recognizing the fact that malapportionment has had a decisive effect in reducing the extent to which the distribution of seats in the legislature reflects the distribution of votes for the political parties on a state-wide basis.[24] As a not accidental consequence of the malapportionment of New York, one finds that the following occurs:[25]

	SENATE			ASSEMBLY	
Year	% of Votes Cast for Republican Candidates	% of Seats to Republican Candidates	Year	% of Votes Cast for Republican Candidates	% of Seats to Republican Candidates
1962	49.96	56.9	1962	49.8	56.7
1960	48.9	56.9	1960	48.2	56.0
1958	49.7	58.6	1958	49.8	61.3

24. While, as we show *infra* malapportionment in New York State has an impact, which is prejudicial to the Democratic Party, malapportionment nationally cannot be said to favor or prejudice one political party. Thus, it has been said:

> "Taking the States as a whole, it is difficult to determine the overall effect of the present structure on the political composition of State legislatures. It is assumed by many that under-represented cities outside the southern and border States are basically strongholds of the Democratic Party, but that the under-represented suburbs in these States tend to support the Republican Party. In the southern and border states the Republican Party has tended to be strongest in the urban areas. In view of the fact that the urban area population of the nation is divided almost equally between the central city and the suburbs, it is difficult to arrive at any overall national concensus as to the party gaining or suffering most from present apportionment practices". Advisory Commission on Intergovernmental Relations, APPORTIONMENT OF STATE LEGISLATURES, p. 28 (Dec. 1962).

25. See, THE POLITICS OF REAPPORTIONMENT (The Atherton Press), Chapter 13, "New York: 'Constitutionally Republican'" by Gus Tyler and David I. Wells. The phrase "Constitutionally Republican" is attributed to former Governor Alfred E. Smith. See also Wells, *op. cit. supra* p. 26, fn. 14.

In this regard malapportionment effectively frustrates the political wishes of the majority, in New York, much more severely than it does in a state in which a single party is dominant. It is a fact of political life in New York that, as a consequence of the formula contained in the State constitution, one political party has been able to perpetuate its majority position in the legislature even though its candidates frequently receive a minority of the votes. The same party has controlled both houses of the legislature during 59 of the 67 years in which the present apportionment provisions have been in force. Thus, it has been said that New York is a two party state with a one party legislature.[26]

In short, measured by all widely used criteria, New York's apportionment is inequitable and geographically discriminatory. We respectfully submit that the district court's failure to recognize this results solely from its failure to apply to that apportionment recognized criteria for measuring such data.

(ii) *Irrational "Horizontal" Disparities—The New York Crazy Quilt.*

In his concurring opinion in *Baker* v. *Carr*, Mr. Justice Clark described the Tennessee apportionment as a "crazy quilt", stressing the fact that:

> "It [the Tennessee apportionment] discriminates horizontally creating gross disparities between rural areas themselves as well as between urban areas themselves, still maintaining the wide vertical disparity already pointed out between rural and urban." 369 U. S. at 256 (footnote omitted).

Precisely this pattern of broad rural-urban discrimination and of irrational disparity within rural and urban

26. *Ibid* at p. 221.

areas exists in New York. The "quilt" in New York is as "crazy" as in Tennessee.

A detailed analysis of the means by which the various apportionment and districting rules contained in the constitution compel the creation of these irrational disparities is contained in the City's Brief pp. 60-76. So as not to burden the Court with undue repetition, we cite herein but a few examples of clearly irrational disparities.

Onondaga County has three Assembly districts. Two of these had a 1950 population of 83,613 each, while the remaining district had a 1950 population of 167,226, making it by far the most populous Assembly district in the state. This result is compelled by the New York Constitution, Article III, §5, par. 4, which provides that if the Assembly districts cannot be evenly divided among the Senate districts in a county to which such Assembly districts are apportioned, Senate district lines may not be disregarded and the odd Assembly district must be placed in the Senate district having the smallest population. Elsewhere in the state, population variations among Assembly districts *within the same county* affected by this provision averaged about 50,000 in the 1953 apportionment.

In the pending apportionment, this provision will result in creation of Assembly districts of unequal population in seven counties—Bronx, Kings, Queens, Erie, Monroe, Nassau and Suffolk. This will necessitate the existence of one or more Assembly districts in each of these counties with populations as high as from 142,000 to 190,000—far above the state-wide average of 108,000 per district. Monroe County will show the extreme variance. It will have one Assembly district with the same boundaries as a Senate district, with a population of 190,000 which is twice the population of each of its other four Assembly districts—merely because 5, the number of Assemblymen

Monroe will have, is not divisible by 3, the number of its Senators. In the other counties that will be affected by this rule, the range of population variation between Assembly districts in the same county will be 34,000-63,000.

These variations and other examples of arbitrariness discussed in the City's Brief, are entirely within a single county, are not explicable in terms of a rural-urban dichotomy and are purely the product of irrational and sometimes archaic apportioning and districting rules which produce a New York "crazy-quilt".

II. The Provisions Governing the Apportionment of the New York State Legislature are Violative of the Fourteenth Amendment.

a) In General.

Purposeful systematic discrimination with respect to the exercise of the franchise against a class of citizens fully qualified by a state's own standards to vote[27] is viola-

27. N. Y. Const. Art. II, § 1 provides:

"Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state for one year next preceding an election, and for the last four months a resident of the county, city, or village and for last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, * * *

"Notwithstanding the foregoing provisions after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

N. Y. Const. Art. I, §1 provides:

"No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers, * * *"

tive of the equal protection clause. If such discrimination were based on race or sex, there would be no hesitation in striking down such discrimination under the Fifteenth and Seventeenth Amendments. See, *e.g.*, *Gomillion* v. *Lightfoot*, 364 U. S. 339; *Nixon* v. *Herndon*, 273 U. S. 536; cf. *Smith* v. *Allwright*, 321 U. S. 649. The language of the equal protection clause, designedly couched in the general terms of an organic law,[28] is broad enough to invalidate all invidious discriminations which deprive groups—be they urban residents, redheads or left-handed persons—of the full and free exercise of their basic civil liberties, including the right to vote and the right to have one's vote fully and fairly counted.[29]

We respectfully submit that any apportionment, such as New York's, which has the effect of giving greater weight to the votes cast by persons residing in a particular area of the state than that given to votes cast elsewhere embodies an implicit value judgment that some persons are entitled to a greater influence in government than is proportionate to their numbers. See Lewis, *One Man—One Vote*, The Twentieth Century Fund, September 1962, pp. 3-8.[30]

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28. See McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 663 (1963).

29. "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, *cf. United States* v. *Classic*, 313 U. S. 299; or by a refusal to count votes from arbitrarily selected precincts, *cf. United States* v. *Mosley*, 238 U. S. 383, or by a stuffing of the ballot box, *cf. Ex parte Siebold*, 100 U. S. 371; *United States* v. *Saylor*, 322 U. S. 385". *Baker* v. *Carr*, 369 U. S. 186, 208.

30. Forty reprints of this statement of the consensus of a symposium of political scientists and other experts in the field of reapportionment were lodged with the Clerk together with the Jurisdictional Statement in this case.

New York's apportionment provisions indeed reflect a value judgment, sometimes made explicit,[31] that persons who resi in urban areas are intellectually and morally inferior and are less qualified to be heard in matters of government than their fellow citizens residing in the rural areas.[32] Regardless of what the basis for the discrimination may be, it is obnoxious to the equal protection clause so to classify citizens for the purpose of exercise of the franchise. The romantic notion that the man who tills the soil is a finer person or a better citizen is nothing more than a romantic notion which cannot be tolerated under our democratic system. Nor is there merit in the contention that rural minorities need protection from urban majorities. Minority groups in our country are protected by laws and by constitutions. They are not protected by making the minority a majority for purposes of voting: for who is to choose which minority is to be so favored and on what basis is that choice to be made?

We submit that the plea for protection of rural minorities is merely another, perhaps more euphemistic way, of expressing the belief in the superiority of the

31. See Appendix C, *infra*, pp. 131-139.

32. There is no scientific or other evidence to support a claim that urban residents are inferior. Indeed a claim might be made, based on objective studies, in support of a contrary position. See, *e.g.*, Dr. Eli Ginzberg *et al.*, THE INEFFECTIVE SOLDIER (New York: Columbia University Press, 1959) based on an analysis of draft board rejections and on case studies of soldiers who collapsed under strain. For a popular summary of such studies, see Bliven, *The City Boy v. The Country Boy*, N. Y. Times Magazine (August 16, 1959), p. 20.

rural resident.[33] As other commentators have noted[34] in those states in which the urban population constitutes a minority, no plea is ever heard to give additional weighting to the votes of the urban minority to protect them against domination by the rural majority.

Equally without merit is the notion that "area" must be represented in the state legislature. Political subdivisions do not cast ballots; acres do not vote. The question is not whether political subdivisions or geographical areas should be represented, but whether individual voters should have a greater say at the ballot box because of their residence. Both Judge Levet writing for the court below (R. 313) and Judge Ryan, in his concurring opinion (R. 321-322), emphasized the fact that the "six plaintiff counties" contain 56.2% of the state's population but only 3.1% of the area of the state, and that if apportionment were based on population this would mean that the majority could be elected by persons residing in 3% of the state's area. However, the nationwide statistics indicate that 70% of the population resides in 1% of the area.[35] Obviously, if the area factor were to be controlling

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33. For a contemporary expression of this view, see an extension of remarks made by Assemblyman Paul Reed Taylor of Yates County on the floor of the Assembly, published under the title "Civic Virtue Lives in the Country", Monitor, May 1962, pp. 7, 8, 20. Assemblyman Taylor wrote in part:

> "The words communist and countryman are practical antonyms * * *. In contrast to the countryman's stability there is plenty of evidence that the city dweller has limitations on his self-governing abilities * * *. The small town and rural man forever fights for liberty. He deserves a wage of a little extra legislative representation * * *."

Yates County is the second most over-represented county in the state (R. 229).

34. See, *e.g.*, Lewis, *op. cit. supra*, p. 40.

35. Schattschneider, *Urbanization and Reapportionment*, 72 YALE L. J. 7 (1962).

over population in both houses of the legislature, this would mean that, on a national level, 30% of the population would have the power to elect 99% of the legislators. Moreover, the concept of area representation embodies notions of localism which are today as anachronistic as the belief in rural virtue as opposed to urban vice. In today's America, one out of every five persons moves each year.[36] We are witnessing a dynamic readjustment of our population with a shrinking of both the rural population and the population of the center city and a vast expansion of suburbia. It is arbitrary and irrational in the context of this rapid population movement to weight a citizen's vote on the basis of where he happens to be resident at the time of a particular election. Among other vices, New York's apportionment system is entirely obsolete.[37]

Modern political scientists and commentators agree that it is easier for a political representative in a less densely populated area both to be advised of the thinking of his constituents and to inform them of his beliefs and opinions. Matters of purely local concern receive much more attention in a small community newspaper or over a small community radio station than is possible in a more densely populated area. If, therefore, the notion of "accessibility" which the district court relied upon in approving the present apportionment of New York has any merit, it is an argument in support of appellants' position.

If the district court was correct in its holding that the New York apportionment is rational because of considerations of "area" and "accessibility", then *Baker* v. *Carr* will permit judicial intervention in only a very few of the

36. *Ibid.*

37. See City's Brief pp. 55-60 for a further development of this point.

very many instances in which gross malapportionment infects our state legislatures. And even in those instances, the malapportioned legislatures themselves may readily preserve the status quo, if they so choose, by unabashedly adopting legislation explicitly designed to discriminate against voters in the more populous areas in the same manner in which their present apportionments so discriminate. If no more rationality is required than the bold assertion that rural voters are to be preferred, then the inequities which now exist in many states by virtue of the passage of time and shifts in population may be perpetuated by the enactment of legislation explicitly designed to achieve this end. The net result will have been to place judicial sanction on malapportionment which results not from accident but design and the cause of revitalizing state government and fostering local responsibility will suffer a severe setback.[38]

38. See McKay, *op. cit. supra* fn. 28 at 705.

"*Baker* v. *Carr* marks the full maturation of the liberterian aspects of the equal protection clause and provides the courts, federal and state alike, with an opportunity to vindicate as a constitutionally protected right the assurance to all persons of an opportunity to full and equal participation in the principal rite of the democratic process, the exercise of the franchise. As state legislatures become more fully responsive to the electorate whom they serve there should be renewed opportunity for the states to demonstrate the wisdom of reserving to the states those powers not committed to the national government.* The plea of states' rights can become again the dignified and meaningful claim to separate sovereign rights and obligations that it should always have been, rather than the strident and prideful cry it has sometimes seemed."

*"[T]here is a strong national interest in encouraging vigorous and responsible State and local government." House Comm. on Gov't Operations, *Federal-State-Local Relations: Federal Grants-In-Aid*, H.R. Rep. No. 2533, 85th Cong., 2d Sess. 47 (1958). See also THE EDITORS OF FORTUNE, THE EXPLODING METROPOLIS 1 (1957); U. S. COMM'N ON INTER-GOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT 3, 38, 40 (1955)].

b) MacDougall v. Green and Gray v. Sanders.

MacDougall v. *Green*, 335 U. S. 281, is not contrary to appellants' position and does not indicate that a state may apportion its legislature disproportionately to population. Challenge, in that case, was directed at an Illinois statute governing the nominating procedures by which a political party established a right to appear on a state-wide ballot. The Illinois statute required that any political party as a condition of *initial* access to the ballot, furnish nominating petitions contain at least 25,000 signatures including a minimum of 200 voters from each of at least 50 of the 102 counties of the state. It was, thus, in the context of a nominating process prior to a state-wide election, that this Court wrote (335 U. S. at 284):

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, *in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.*" (Emphasis added.)

Obviously, this reasoning of the Court is entirely inapplicable to matters of state legislative apportionment which in New York concern 150 separate Assembly districts and 58 separate Senate districts. Only those resident in the particular district have a right to participate in the election of each Assemblyman and each Senator. The majority does not have the "practical opportunities for exerting [its] political weight at the polls" of which the Court spoke in *MacDougall*.

If, however, an analogy is to be drawn from decisions involving state-wide office, *Gray* v. *Sanders*, 372 U. S. 368, not *MacDougall*, points the way. In the *Sanders* case, the Court wrote at 379-381:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions. . . .
>
> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote".

While we fully recognize the explicit qualification of that decision to cases involving a single constituency, we believe it to reflect prevailing judicial and popular attitudes concerning equality of voters. If within the state as a whole the concept of "one man—one vote" is mandatory, it is difficult to perceive how or why notions of inequality should be tolerated when the state is divided into political subdivisions. Were the offices involved county or municipal offices, the size of a constituency might not greatly concern one living outside the district—the persons elected would have no power or authority over the outsider. But here the offices are in

the state legislature with power to govern over the entire state. If, in the election of the governor, everyone's vote must be equal (*Gray* v. *Sanders*)—in the election of the legislature—a body which collectively constitutes a state-wide authority, the same concept should prevail. It is imperative to bear in mind that this case does not involve the rights of local governments to govern over their separate districts or the size of such districts for purposes of local self-government—it involves the right of all citizens to have an equal voice in determining the composition of the legislature which governs over the state as a whole.

c) Apportionment Must be Proportionate to Population.

In short, we embrace and endorse the majority position adopted by the Advisory Commission on Intergovernmental Relations in its report, "Apportionment of State Legislatures", Dec. 1962, p. 67:

> "*'Equal protection of the laws' would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population.*"

See also *Sincock* v. *Duffy, supra; Moss* v. *Burkhart,* F. Supp. (W.D. Okla., July 17, 1963).

Apportionment on a population basis does not of course mean that all other factors are disregarded in determining the composition of the legislature. Obviously this standard does not demand that the state be divided arbitrarily into sectors of precisely equal population without regard to natural boundaries or previously existing units of local government. However, the use of other valid criteria need not, and indeed must not, prevent the result-

ing districts from being approximately equal in population. Where other considerations conflict with the principle of equality of population—for example, where there is a desire to provide one representative for each political subdivision and the number of political subdivisions in relation to the total size of the legislature makes this not feasible—the other considerations must yield in favor of the requirement of equal population made paramount by the Fourteenth Amendment. In other words, the equal protection clause requires precisely the converse of the state apportionment provisions which first declare that Senate and Assembly districts shall be as nearly equal in population as possible and then subordinate this concept to other considerations which effectively preclude population equality. See p. 21, fn 7; pp. 25-31, *supra*. Counties must be joined, the size of the legislature increased or some other accommodation made—but voters may not be made to suffer reduced rights of the franchise.

Mathematical exactitude is not required and as a practical matter is not always attainable. The law has always recognized a concept of *de minimus*. Where variations between population and representation exist however, they must be so slight as not to distort the concept of the legislature being representative of the people. Such deviations should be permitted only within a narrow range. The existence of any significant variations should cast upon the state the burden of explaining and justifying the need for such variations. To the extent that any variations from population are constitutionally tolerable, they must result solely from the desire to make the accommodations described above and not from a desire purposefully and systematically to discriminate against one class of citizens. The fact that such variations consistently operate to the detriment of one class of voter would make their existence

particularly suspect; an explicit intent to deviate from population because of a hostility towards one class of citizens would render the apportionment invalid. See pp. 55-63, *infra*.

d) The Constitutional Provisions for Apportionment of Both Houses of the Legislature Should be Invalidated.

The question of the so-called federal analogy—*i.e.* whether, by analogy to the federal congress one house may represent population and another house represent political subdivisions[39]—is not presented by the instant case. In New York, both houses of the legislature are seriously malapportioned. As we will show in the section on the absence of a political remedy (*infra* p. 66), no effort has been made by the legislature to correct the situation in either house. We believe that this court should reject as inapplicable the so-called federal analogy (see *Gray* v. *Sanders*, 372 U. S. 368) and hold that in both houses of the legislature population must be the controlling factor (see *Sincock* v. *Duffy*, *supra*). However, even if this Court were to accept some version of the federal analogy, the people of the State of New York have never definitely indicated which house of their legislature would be the body to represent population rather than political subdivisions.

The situation in New York is unusual. The term of office of both Senators and Assemblymen is two years.[40] The smaller body—the 58 man Senate—is more nearly apportioned in relation to population than the 150 man

39. For a compelling statement of the reasons why the federal analogy should be rejected, see McKay, *Reapportionment and the Federal Analogy* (NAT'L MUNICIPAL LEAGUE, Aug. 1962).

40. N. Y. Const. Art. III, §2, App. A *infra*, p. 75.

Assembly.[41] Counties may be joined in forming single Senate districts whereas each county (except Fulton and Hamilton) has at least one Assemblyman.

It is not possible, therefore, to say that in New York either the Senate or the Assembly is the body which must—if only one house must—be apportioned in direct relationship to population. It would be incongruous if, on the basis of the federal analogy, the smaller upper house were selected to represent population. In any event, clearly, this is a decision which should be made in the first instance by the legislature and not a court. Since both the Senate and Assembly apportionment formulae are contained in the State constitution, the legislature would not be free to choose which formula to alter unless both were invalidated.

If the apportionment formula for only one house were invalidated, the legislature could enact an immediately effective statute with respect to that house only, but would have to proceed by the cumbersome procedure of constitutional amendment with respect to the other house. A minimum of three years must elapse between initial action on such an amendment and the time it could take effect.

Therefore, regardless of whether this Court accepts or rejects the federal analogy in litigation which is directed at only one house of another state's legislature, the relief sought in this action as to both malapportioned houses should be granted to enable the legislature to deal with the problem of reconstituting the state government as a whole rather than by piecemeal measures widely separated in time of effectiveness.

Moreover, the doctrine of separability is applicable here. The composition of the bicameral legislature is a single

41. In the Senate, the ratio between the largest and smallest district was 2.4 to 1 in 1950; in the Assembly, the ratio was 11.9 to 1. See p. 34, *supra*.

complex interrelated problem. The provisions relating to the number and terms of Senators and Assemblymen are, for example, contained in a single section of the constitution, Art. III, §2. In addition, the constitution prohibits the establishment of Assembly districts which include parts of more than one Senate district; therefore, the districting provisions for the two houses are inter-dependent. Hence, the entire apportionment structure should be invalidated and referred to the legislature for revision. See *Sincock* v. *Duffy*, 215 F. Supp. 169, 188-189; see also 195-196 (opinion concurring in part and dissenting in part) (Del. 1963) appeal pending, No. 307 Oct. T., 1963, *sub nom. Roman* v. *Sincock; Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312. This can only occur if the constitutional provisions for apportionment of both houses (Art. III, §§2-5) are invalidated.

III. The District Court Did not Rehear and Reconsider in the Manner Contemplated by this Court's Remand.

In remanding this case, this Court wrote that: "On March 26, 1962, we held in *Baker* v. *Carr*, 369 U. S. 186, that a justiciable federal constitutional cause of action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminating geographical classification * * *. As in *Scholle* v. *Hare*, 369 U. S. 429, we believe that the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination." *WMCA, Inc.* v. *Simon*, 370 U. S. 190, 191.

We submit that this Court intended this burden of showing invidious discrimination to be a meaningful one

which was capable of being met in circumstances not limited to the particular facts involved in the Tennessee case. The remand was not intended to be an academic matter nor an exercise in futility. But the district court made it this in holding that:

A. The appellants had the burden of proving the unconstitutionality of the apportionment provisions which had a presumption of constitutionality made all the stronger by virtue of the fact that they were included in the state constitution itself, and, in further holding that a showing of the extent of malapportionment and the extreme under-representation of residents in the more heavily populated areas did not establish either a *prima facie* case which the State must justify or rationalize or a *per se* violation which could never be justified or rationalized.

B. All matters relating to a purpose and intent to discriminate and all matters relating to economic deprivations suffered by virtue of the malapportionment were irrelevant.

(a) *The district court erred in placing an undue burden of proof on appellants.*

We respectfully submit that appellants more than met whatever procedural burden they may have had when the parties stipulated to the apportionment data of the state (R. 226-242). *Davis* v. *Synhorst*, 217 F. Supp. 492, 497 (S.D. Iowa 1963); *Sincock* v. *Duffy*, *supra*; *Moss* v. *Burkhart*, 207 F. Supp. 885, 891 (W.D. Okla. 1962). True, statutes are presumed to be constitutional and the challenger has an initial burden to come forward to show that those statutes infringe constitutional rights. Where, for example, the challenge is based on an alleged infringement of the equal protection clause by some regulation or

classification of an economic nature, the burden is a formidable one and continues to rest with the plaintiffs until the presumption is overcome by compelling evidence. Where, however, the challenge relates to the exercise of basic civil liberties, then, and for good reason, the presumption of validity disappears (or is satisfied) when such an infringement is alleged (and the allegation is clearly not frivilous).[42] "There are limits to which the presumption of constitutionality can be pressed * * *." *Skinner* v. *Oklahoma*, 316 U. S. 535, 544. The state, operating in an area where its power is severely circumscribed rather than being plenary, must establish the reasonableness and authority for the restraint placed upon the exercise of the civil liberty.

Nowhere does this concept have greater force than when related to such activities as free speech and the exercise of the franchise which are processes themselves relied upon to correct governmental abuses. We urge that an affirmative answer must be given to Justice Stone's query in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, fn. 4:

> "* * * whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subject to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

We further urge that apportionment cases are primary examples of instances in which a "more exacting judicial scrutiny" must be furnished.[43]

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42. McKay, *op. cit. supra*, fn. 28 at p. 677.

43. See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, in which Justice Matthews observed that the political franchise of voting, "* * * is regarded as a fundamental political right, because preservative of all rights." 118 U. S. at 370.

Nor was the lower court justified in increasing appellants' burden solely by virtue of inclusion of the apportionment provisions, in 1894, in the state constitution. Of course, state constitutions may offend the federal constitution. From the standpoint of the federal constitution, it is irrelevant whether the discrimination is primarily a result of designed legislative inaction contrary to the state constitution, as in *Baker*, or of affirmative action which takes the form of enactment of constitutional provisions and statutes implementing those provisions, as in this case. Cf. *Giles* v. *Harris*, 189 U. S. 475; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Gibson* v. *Board of Public Instruction*, 170 F. Supp. 454, 456 (S. D. Fla.) (1958).

A group temporarily dominant in a single state[44] cannot abrogate the federal constitution by a majority vote. Indeed, in other apportionment cases the courts have recognized that inclusion of the apportionment provisions in the state constitution in no way altered the the basic problem before the court.[45] We respectfully submit that the lower court erred when it held that "unless the invalidity is clear and definite", the apportionment provisions would not be overthrown *because* they were embodied in a state constitution (R. 313-314) —and thereby imposed upon the appellants a greater burden than if the provisions were purely statutory.

When, therefore, appellants showed that malapportionment existed to the extent demonstrated in this case at least a *prima facie* case was established. We believe that even more was shown—that a *per se* violation was demonstrated and that *nothing* that the State could say or cite

44. The apportionment formula was adopted in 1894 by a vote of 404,335 to 350,625 (R. 297).

45. See, *e.g.*, *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga., 1962).

would justify such gross disproportions in both houses of the legislature. *Sincock* v. *Duffy, supra,* 215 F. Supp. at 185. But the question of whether appellants established merely a *prima facie* case or showed a *per se* violation is an academic one in this case. The district court did not dismiss at the conclusion of appellants' case but called upon the State to present its evidence (R. 182-183). The State in fact called no witnesses and offered no evidence beyond the stipulated facts.[46] It, therefore, failed to meet—if it could possibly ever meet—the burden cast upon it by appellants' proof.

This Court, therefore, should reverse the court below and remand the case with instructions to grant the relief sought in the complaint.

(b) *The district court erred in refusing to consider the purpose and intent of the apportionment provisions and the economic consequences of malapportionment.*

(i) *Purpose and intent*

In support of the allegation of the complaint alleging a purposeful and systematic discrimination against urban

46. Counsel for the State indicated that, but for the rulings of the court limiting the scope of admissible evidence, the State would have presented evidence. Whereupon, the following colloquy took place (R. 182-183):

> "Judge Waterman: We are neither interested in what you might have done or interested in what you could have done. Do you have any evidence that you intend to put in on the issues as we have pitched them?
>
> "The answer is no, so you have a motion to dismiss, and you want to argue it, is that right?
>
> "Mr. Galt: That is correct, your Honor.
>
> "Judge Levet: I take it that there is no testimony that the State is going to put in?
>
> "Mr. Galt: In view of the Court's ruling this morning, we feel—
>
> "Judge Levet: No matter why it is, is it so?
>
> "Mr. Galt: It is so, your Honor."

residents (Complaint ¶17, R. 8-9), constituting affirmative legislative action discriminating against such residents (Complaint ¶22, R. 10-11; *cf. Gomillion* v. *Lightfoot*, 364 U. S. 339), appellants offered to prove that the apportionment provisions were adopted with the intent to discriminate against residents of New York City. The district court rejected this offer (R. 144-145) and nowhere in the opinion of the court below (including that portion of the opinion devoted to the so-called "historical basis" (R. 307-311)) is there any consideration or discussion of the legislative history of the 1894 amendment or of its purpose and intent.[47] The reasoning of the court below may be discerned from its prior opinion dismissing the complaint without a hearing, where the court wrote (202 F. Supp. at 471; R. 109):

> "The plaintiffs charge the State of New York with a 'purposeful and systematic plan' to discriminate against certain geographic areas and classes of persons. (Par. 17 of complaint) However, the rule is general with reference to the enactments of all legislative bodies that the courts cannot, with certain exceptions, inquire into the motives of the legislators. *Soon Hing* v. *Crowley*, 1885, 113 U. S. 703, 710. 'The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith'. *United States* v. *Des Moines, etc., Company*, 1892, 142 U. S. 510, 544. See also, *Sonzinsky* v. *United States*, 1937, 300 U. S. 506, 513; *McGowan* v. *Maryland*, 1961, 366 U. S. 420, 468, 469."

47. Ironically, in the New York congressional districting case, *Wright* v. *Rockefeller*, 211 F. Supp. 460, *appeal pending* No. 96, Oct. T. 1963, probable jurisdiction noted, 374 U. S. 803, a differently constituted district court sitting in the Southern District of New York denied relief because of a failure to prove a purpose or motive to discriminate in drawing the congressional boundaries.

That the court adhered to this view at the hearing following this Court's remand of the case is evident from the following colloquy (R. 144-145):

> "Mr. Sand: I would offer to show that each rule which specifically operates to restrict and limit the representation of the residents of the City of New York was intentionally devised for the very purpose of creating a class of citizens within the state whose vote was not equal to that of another preferred class of citizens in the state.
>
> "Judge Waterman: As to that offer of proof, the Court unanimously excludes it on the ground that what caused the Legislature to act or what proof may be introduced at this stage as to the Constitutional Convention's thinking in 1894 would have to be of such a nature that it isn't of any interest to this Court. All we have before us is a question of law, and the question of law is not involved with the intent in the minds of whoever may have happened to be members of the Constitutional Convention of 1894."[48]

It is respectfully submitted that the lower court's refusal to consider the legislative history and background of an enactment said to discriminate intentionally against a class of citizens is contrary to the holding and practice of this and other federal courts in cases involving basic civil liberties.[49]

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48. Had the lower court rejected appellants' offer of proof and proceeded to note judicially the legislative history of the apportionment provisions alleged by appellants to show an intent to discriminate, the issue before this Court might be a different one. The court made clear, however, that it regarded all such matter as irrelevant and immaterial and, although judicially noting other facts (R. 296-298) made no reference to the legislative history of the present apportionment formulæ.

49. In so ruling, the district court relied in its first opinion of dismissal (R. 109) upon cases in which it was unsuccessfully con-

In *Davis* v. *Schnell*, 81 F. Supp. 873 (S. D. Ala. 1949), *aff'd*, 336 U. S. 933, the plaintiffs alleged that an amendment to the Alabama constitution violated their rights under the federal constitution. The lower court summarized plaintiffs' contentions as follows:

> "They allege that this amendment was purposely sponsored, its adoption obtained, and its provisions are being administered so as to prevent the plaintiffs and others, because of their race, from exercising their right to vote," 81 F. Supp. at 874.

In invalidating this amendment to the Alabama constitution, the court discussed in great detail the legislative history and background leading to the adoption of the amendment, including the statements made by those who

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tended that legislation designed to accomplish one purpose was in fact motivated by some other desire although neither the legislative history of the statute nor its language disclosed the alleged ulterior motive. Thus, in *Soon Hing* v. *Crowley*, 113 U. S. 703, 710, the Court wrote: "There is nothing, however, in the language of the ordinance, *or in the record of its enactment*, which in any respect tends to sustain this allegation [of intent to discriminate against Chinese]" (emphasis added). In *Sozinsky*, reference is made to "hidden motives" (300 U. S. at 513) and in *McGowan* the Court speaks of "private and unformulated influences." 366 U. S. at 469. Obviously, such circumstances are distinguishable from cases, such as the instant one, in which reliance is placed, not on a hidden ulterior motive for legislation innocuous on its face, but on explicit legislative history to support the contention that the state intended to do what it in fact accomplished—discriminate against a class of citizens. Nor is there here involved an inquiry into the "personal motives" of the delegates. *Baker* v. *Carr*, 369 U. S. at 337 (dissenting opinion of Mr. Justice Harlan). See Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker* v. *Carr*, 61 MICH. L. REV. 107, 140 fn. 138. More apposite is the language (369 U. S. at 335) where, in distinguishing the Tuskegee case, Mr. Justice Harlan wrote: "It is not that Tennessee has arranged its electoral districts with a deliberate *purpose* to dilute the voting strength of one race, *cf. Gomillion* v. *Lightfoot*, 364 U. S. 339, or that some religious group is *intentionally* underrepresented." (emphasis added)

sponsored and advocated adoption of the amendment. For example, the court wrote:

> "The activities of this committee in supporting and leading the fight for the adoption of the Boswell amendment are admissible and material in determining whether the Boswell Amendment is a contrivance by the State to thwart equality in the enjoyment of the right to vote by citizens of the United States on account of race or color." (p. 879)

After tracing the history of the amendment, the court wrote:

> "All of the foregoing but illustrates the *intention and general understanding* of the Legislature and electorate of Alabama at the time this Amendment was adopted by a small majority of a light vote." (Emphasis added.) (p. 880)

Summarizing the actual practice under the amendment, the court concluded:

> "It, thus, clearly appears that this Amendment was intended to be, and is being used for the purpose of discriminating against applicants for the franchise on the basis of race or color." (p. 880)

See *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 53 where this Court referred to the "legislative setting" of the amendment invalidated in *Davis* v. *Schnell*.

Other instances in which courts, including this Court, have considered the legislative background of an enactment to discern whether the intent thereof is to discriminate in violation of constitutional rights may be cited. In *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, this Court took note of the district court's findings that the

acts there in question were passed "'• • • 'to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 • • •' as parts of the general plan of massive resistance to the integration of the schools of the state under the Supreme Court's decrees'". 360 U. S. 167, 175.

See also *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156, 165 (5th Cir. 1957); *Board of Supervisors of La. St. U. etc.* v. *Ludley*, 252 F. 2d 372, 376 (5th Cir. 1958); *Ludley* v. *Board of Supervisors of L. S. U.*, 150 F. Supp. 900, 902-903 (5th Cir. 1957).

As the court wrote in *N.A.A.C.P.* v. *Patty*, 159 F. Supp. 503, 515, fn. 6 (E.D. Va. 1958), *aff'd sub nom. Harrison* v. *N.A.A.C.P.*, 360 U. S. 167:

> "While it is well settled that a court may not inquire into the legislative motive (*Tenney* v. *Brandhove*, 341 U. S. 367, 377, 71 S. Ct. 783, 95 L. Ed. 1019), it is equally well settled that a court may inquire into the legislative purpose. (See *Baskin* v. *Brown*, 4 Cir., 174 F. 2d 391, 392-393, and *Davis* v. *Schnell*, D. C., 81 F. Supp. 872, 878-880, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L. Ed. 1093, in which state efforts to disenfranchise Negroes were struck down as violative of the Fifteenth Amendment). Legislative motive—good or bad—is irrelevant to the process of judicial review; but legislative purpose is of primary importance in determining the propriety of legislative action, since the purpose itself must be within the legislative competence, and the methods used must be reasonably likely to accomplish that purpose. Because of this necessity, a study of legislative purpose is of the highest relevance when a claim of unconstitutionality is put forward. Usually a court looks into the legislative history to clear up some statutory ambiguity, as in *Davis* v. *Schnell*, D. C., 81 F. Supp. at page 878; but such

ambiguity is not the *sine qua non* for a judicial inquiry into legislative history. See the decision in *Lane* v. *Wilson*, 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281, in which the Supreme Court showed that the state statute before the court was merely an attempt to avoid a previous decision in which the 'grandfather' clause of an earlier statute had been held void."

If, as the foregoing cases fully demonstrate, evidence of the purpose and intent of a state legislature to discriminate (as established by the "legislative setting" of the challenged enactment, *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. at 53), is admissible and material where the action is based on a violation of the Fifteenth Amendment, we can conceive of no reason why such evidence is not equally admissible and material with respect to an alleged violation of the Fourteenth Amendment. And, the fact that the "legislative setting" relates to a more remote period of time, makes inquiry into such setting even more important than if the events were current and vivid in the minds of the court.

If we are in error in our principal contention that the population statistics alone established a *prima facie* case which the state failed to meet, then we respectfully urge that the district court erred in excluding from its consideration all material relevant to the purpose and intent of the convention in enacting the apportionment formulae. This ruling effectively frustrated a full inquiry into the question whether, apart from the question of numerical disparities alone, those formulae invidiously discriminate against appellants and persons similarly situated.

If in fact an intent existed to discriminate against urban residents, towards whom the then majority felt

antipathy, the adoption of the apportionment provisions and the statutes implementing them constituted, as alleged in the second cause of action (R. 10-12), affirmative legislative action in violation of appellants' constitutional rights (cf. *Gomillion* v. *Lightfoot*, 364 U. S. 339, 346)—a contention entirely ignored by the district court. Moreover, if any variations from representation based on population distribution may be tolerated under the Fourteenth Amendment, whether they are the accidental product of an apportionment innocently devised or the calculated result of an intent purposefully and systematically to discriminate against a class of citizens, is surely relevant in determining the extent of the tolerable variations.

The most persuasive evidence of what the Constitutional Convention of 1894 intended to accomplish is, of course, what the Convention did, *i.e.*, enact an apportionment procedure which provides a different and more onerous standard for establishing the entitlement to representation of the more heavily populated areas of the state. See pp. 26-31, *supra*. Were there no more evidence of an intent to discriminate than this, we submit a sufficient showing would be made solely on the basis of the effects of the apportionment system devised by the Convention. *Cf. Gomillion* v. *Lightfoot*, 364 U. S. 339.

However, one need not merely infer intent from what the Convention *did*; what the delegates to the Convention *said*, during the Convention proceedings, made explicit the purpose and intent of the Convention to discriminate against residents of such areas in the apportionment of the legislature. The records of the Convention disclose that the basis for this discrimination was a belief that residents of the heavily populated areas were inferior morally, intellectually and in ability to govern.

We have set forth in Appendix C, pp. 131-139, portions of the legislative history of the constitutional provisions

upon which appellants rely in support of these allegations. Appellants rely solely on the record of the proceedings of the constitutional convention as set forth in the REVISED RECORD OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1894 and described in Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK (1905). The material may appropriately be judicially noted and appellants urge that if this Court deem intent to be relevant, it determine in the first instance whether an intent to discriminate existed and is manifested in the New York apportionment formulae. Until such a determination is made, any evaluation of the state's apportionment must be predicated on the assumption that such an intent existed. As noted, the complaint alleges a purposeful and systematic plan to discriminate (¶17, R. 8) and the district court, in holding intent to be irrelevant, in effect held that, even if such intent existed, the apportionment would nevertheless be constitutional. If this Court should decline to resolve this question in the first instance, then the very minimum relief to which appellants are entitled is that the decision below should be reversed and remanded with instructions to admit the proffered evidence and to adjudicate the question whether or not New York's apportionment formulae is discriminatory in the light of all the facts and circumstances pertaining to those formulae, including its "legislative setting" and the purpose and intent with which it was enacted.

(ii) *Economic consequences of malapportionment; deprivation of due process.*

The complaint alleged that "The Plaintiffs are denied the right to due process and the equal protection of the laws as guaranteed by the XIV Amendment to the

Constitution of the United States * * *" (¶6, R. 4). The complaint further alleged:

> "The State Legislature, the apportionment of which is controlled by the provisions challenged herein, has, as a result of such apportionment, consciously and purposefully discriminated against the Plaintiffs and others similarly situated in such manner as to deprive such persons of due process and the equal protection of the laws.
>
> "As a result of the aforesaid malapportionment the legislature of New York for a number of years has denied to Plaintiffs and to others similarly situated the equal protection of the laws by unjustly discriminating against large segments of the population of the state in the allocation of the burdens of taxation and in the unequal and unjust distribution of funds derived by the state through the exercise of the taxing powers. Plaintiff W.M.C.A., Inc. and the individual plaintiffs have been subjected to taxation without adequate representation in violation of the XIV Amendment." (¶18, R. 9)

Appellants and appellees representing the City of New York and the County of Nassau offered proof in support of these allegations of the complaint (R. 132, 142, 147, 149.)[50]

50. See also R. 133-134, where appellants offered to prove by competent testimony the material set forth in the affidavit of appellant R. Peter Straus. Mr. Straus' affidavit sets forth in detail many specific instances in which the residents of New York City are discriminated against by the malapportioned legislature (R. 250-268i). This affidavit, in a substantially similar version, together with the affidavit of Dr. Silva, were originally annexed to appellants' moving papers in connection with their motion to convene a three-judge court (Original Transcript, pp. 43-94). Mr. Straus' affidavit was updated and it, and Dr. Silva's affidavit, were annexed as appendices to Appellants Opening Brief Before the Three-Judge Court (R. 131, 251). Both affidavits were marked as exhibits for identification to clarify the nature of appellants' offers of proof (R. 149-151).

The district court rejected these offers of proof and totally ignored appellants challenge to the constitutionality of the apportionment provisions insofar as it was predicated on the due process clause.[51]

We submit that it was error for the district court to deprive appellants of an opportunity to establish both a violation of the "due process clause" and an additional means of proving invidious discrimination in violation of the equal protection clause.

The interrelationship between the "due process" and "equal protection" clauses is well recognized. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497. In *Baker* v. *Carr*, this Court thought it inappropriate to pass definitively on a due process claim at the preliminary stage of the proceedings in that case, 369 U. S. at 194-195, fn. 15.[52] Unfortunately, with respect to the due process claim—*i.e.*, the contention that, because of malapportionment residents of the most heavily populated areas suffer unlawful economic discrimination in the allocation of government benefits and services—the record here is equally meager since the district court permitted no evidence to be adduced in support of the claim.

Accordingly, we respectfully submit that, if this Court rejects the contention that proof of disparities from popu-

51. Paradoxically, while this district court believed proof of actual injury resulting from malapportionment to be irrelevant, the dissenting judges in *Scholle* v. *Hare*, 367 Mich. 176, 214, appeal pending No. 24, Oct. T. 1963, expressed the view that plaintiffs in the Michigan case had failed to prove unconstitutionality because of the lack of a showing of actual injury. (See R. 134, where this fact was called to the district court's attention.) See also *Sincock* v. *Duffy*, *supra*, in which the court noted the relationship between taxes paid to the state and representation in the legislature.

52. Challenge under the due process clause is here directed not at the statutes enacted by the malapportioned legislature but at the provisions which create the malapportionment which enables the passage of discriminatory legislation.

lation alone constitutes a *prima facie* case and either declines to make a finding in the first instance on the question of intent to discriminate or makes a finding adverse to appellants' contentions (see pp. 55-63, *supra*), this case should be remanded to the district court with instructions to permit the development of a full record on the issue of actual economic injury as proof of the existence of a violation of the Fourteenth Amendment.

IV. Appellants Lack any Practical Political Remedy; the Need for Judicial Intervention is as Great Here as in *Baker* v. *Carr* and *Gray* v. *Sanders*.

Although we do not concede that the existence of a political remedy would render a violation of the Fourteenth Amendment immune from judicial correction, *Moss* v. *Burkhart*, 207 F. Supp. 885, 894 (W. D. Okla., 1962), we note that in New York no such remedy exists.[53] Like Tennessee and Georgia, New York has no initiative and referendum procedure and repeated efforts to obtain such a means of constitutional amendment have all been in vain. See, *e.g.*, New York State Constitutional Convention Committee Report (1938), Vol. II, pp. 1224-28, Vol. VII, pp. 377, *et seq.*

Amendment procedures which require the approval of the malapportioned legislature itself of course exist, but cannot be regarded as a source of reform. See *Baker* v. *Carr*, 369 U. S. at 258-259 (concurring opinion of Mr. Justice Clark). The history of legislative non-action on this subject is clear. For example, in 1955, then Governor Averell Harriman's first annual message to the legislature recommended a constitutional amendment to "remedy

53. This point is exhaustively treated in the City's Brief and, to avoid repetition, the contentions are merely summarized herein.

the injustice of our present apportionment system". 1955 N. Y. Sess. Laws 1577-78. He repeated this recommendation in each succeeding year of his administration. See 1956 N. Y. Sess. Laws 1524 (annual message), 1632-33 (special message); 1957 N. Y. Sess. Laws 1730 (annual message); 1958 N. Y. Sess. Laws 1819-20 (annual message). The legislature did not act, despite the fact that as early as 1950 a report to the Joint Legislative Committee on Reapportionment of the legislature had concluded that: "The cities, particularly the City of New York, do not have equitable representation in either House" and that the present method of obtaining the ratio of population for apportioning senators is "unfair to urban districts". See *Preliminary Report to the Joint Legislative Committee on Reapportionment*, N. Y. Legis. Doc. 3144, 12 (1950).

The recent experiences with regard to the "Peck Commission"[54] give further ample evidence of the futility of waiting for the legislature to correct the present injustices. When this Commission, studying revision of the Constitution, began to give special attention to the inequities of the existing apportionment procedures, the Commission was allowed by the legislature to expire before it had even completed its recommendations.[55]

Apart from action by the legislature, the only other way the New York Constitution can be amended is by vote of the people *after* a proposed amendment has been adopted by a Constitutional Convention, N. Y. Const.

54. The Temporary State Commission on the Revision and Simplification of the Constitution, the Chairman of which was the Hon. David W. Peck, former Presiding Justice of the Appellate Division (1st Dept.) of the State of New York.

55. See Senate Intro. 3191 (1961) which would have extended the life of the Commission but which died in the Finance Committee.

Art XIX §2; *cf. id.* §3. A Constitutional Convention can be held only if a majority of the people voting thereon vote "yes" on the question, "Shall there be a convention to revise the Constitution and amend the same?" *Id.* §2. This referendum can be presented to the voters in only two ways:

> (1) at such times as the legislature may by law provide (which, for reasons stated above, may be disregarded as a practical alternative); and
>
> (2) once every twenty years at a general election (the question will next be presented in 1977).

The court below seized on this procedure and held that the majority had a political remedy available to it, primarily, if not solely, because this automatic referendum procedure exists, and because on November 5, 1957, the last time the question was presented, a majority of those voting on the question voted "no" (See R. 311-12).

Despite the opinion below, the 1957 vote against holding a constitutional convention cannot reasonably be interpreted as an expression of the majority on "the issue of apportionment". The question which was presented to the voter at the 1957 general election was: "Shall there be a convention to revise the constitution and amend the same?" As worded, the question had no relation whatsoever to legislative apportionment. The vote on this question was "yes" 1,242,568; "no" 1,368,063, *blank and void 2,608,204*. See N. Y. LEGIS. MAN. 1077-78 (1958). The vote was held in an off-year election. No state-wide offices were contested and voter turn-out was extremely light.

Furthermore, there is no basis for concluding that the vote on the question of holding the constitutional conven-

tion was the equivalent of a referendum on the issue of apportionment. Judge Levet's conclusion that the vote on the call for a Constitutional Convention was "heralded as an issue of apportionment" (R. 311) was unfounded. The only "herald" identified by Judge Levet is the then Governor of the State, Averell Harriman, and this on the basis of newspaper reports of three statements which Governor Harriman made in September and October of 1957 (See R. 311-12).

It would seem clear that no weight whatsoever should be given to anyone's opinion, however authoritative, as to the issue actually presented by a question being voted on in a State election.[56] In any event, the statements actually made by Governor Harriman (quoted extensively in the City's Brief) in no way equate the issue of legislative apportionment with a vote in favor of holding a constitutional convention.

Moreover, Governor Harriman was not the only public figure to express an opinion about the issues involved in the referendum on holding a constitutional convention. Former Governor Thomas E. Dewey, for example, urged a "no" vote on the grounds, not that a revision of the constitution was not needed, but that a convention was an "outmoded, unwieldy instrument" for effecting a revision and would "waste" at least $5,000,000. *New York Times*, Nov. 1, 1957, p. 1, col. 1. For attempts to achieve revision of the apportionment formulae by a commission on constitutional revision, see p. 67, *supra*. Former Governor Dewey opposed holding a convention on the ground also

56. The court's inquiry into the intent of the voters in this election contrasts sharply with its refusal to consider official and readily available records relating to the intent of the delegates to the 1894 Convention. See pp. 55-63, *supra*.

that it would have been used to promote the annexation of Nassau and Westchester counties to the City of New York and to raise the constitutional limit on real estate taxes. *Ibid.*

Entirely apposite here is the language of the federal district court in Iowa, which state also has a constitutional convention procedure. The court wrote:

> "The fact that the people of Iowa have repeatedly voted against a constitutional convention is persuasive, but not sufficient to establish their acceptance of the present apportionment. There is no possible way of knowing how many voters voted against the measure even though they regarded the present system as being unsatisfactory * * * Quite possibly a significant number felt that a convention would be futile inasmuch as the details would be left to a malapportioned General Assembly." *Davis* v. *Synhorst*, 217 F. Supp. 492, 501. (S. D. Iowa 1963).

See, also, *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W. D. Wash. 1962), *appeal pending sub nom. Meyers* v. *Thigpen*, No. 381, Oct. T. 1963.

Finally, it cannot be assumed that if a constitutional convention had been held following a "yes" vote, the majority would have been afforded a practical opportunity to exert its weight to correct the present discriminatory method of legislative apportionment. Delegates to the constitutional convention are elected 3 per Senate district, plus 15 delegates elected at large. N. Y. Const. Art. XIX §2. Thus, the same discrimination as exists in the Senate against each of the counties which has 6% or more of the state's population (see pp. 26-30, *supra*) also exists in electing delegates to constitutional conventions. If a

convention had been approved in 1957, the five counties then in this category, with 57.3% of the state's population would have been able to elect only 81 of the 174 district delegates (46.4% of the total). Even in the highly unlikely event that all of the statewide delegates would have been sympathetic to the interests of these counties, they still would have been represented by only 96 of the total of 189 delegates (50.8% of the total).

Clearly, a constitutional convention is not a political remedy for the future. The strong probability is that, in 1978 (the next opportunity to elect delegates to a constitutional convention if the vote in 1977 is in favor of a convention), the population of the counties having 6% or more of the state's population will be unable to elect a majority of the convention delegates including the delegates at large.[57]

In short, by any reasonable standard, the majority of the people of the State of New York do not have available a practical political remedy to correct the discrimination against them which inevitably results from the present method of legislative apportionment contained in the state constitution. In this respect, the position of the majority of the people of New York is no different from the position of the majority of the people of Tennessee or Georgia and the need for judicial intervention is as great here as in *Baker* v. *Carr* and *Gray* v. *Sanders*. Only this Court can cause majority rule to be restored to the 17,000,000 inhabitants of New York State.

57. See City's Brief pp. 87-88 for an analysis of the composition of such a convention in the light of present population trends.

CONCLUSION

For the reasons given above, the judgment of the court below should be reversed and the case remanded to the district court with a direction to grant the relief sought in the complaint. In the alternative, the judgment of the court below should be reversed and the case remanded to the district court with a direction to admit and consider the evidence excluded at the prior hearing.

Respectfully submitted,

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September 1963

APPENDIX A

UNITED STATES CONSTITUTION, FEDERAL STATUTES AND STATE CONSTITUTION AND STATUTES INVOLVED.

UNITED STATES CONSTITUTION; Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the **United States and of the State where they reside. No State shall make or enforce any law which shall abridge** the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny** to any person within its jurisdiction the equal protection of the laws. • • •

FEDERAL STATUTES:

U. S. C., Title 42, Sections 1983 and 1988:

§ 1983 Civil Action for deprivation of rights—

Every person who, under color of any statute, ordinance, **regulation, custom or usage, of any State or Territory,** subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988 The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this

chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

U. S. C., Title 28, Section 1343, § (3):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person. * * * To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any rights, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

The Federal Declaratory Judgment Act. U. S. C., Title 28, Sections 2201 and 2202:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

THE CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE III—LEGISLATURE

§ 1. The legislative power of this State shall be vested in the Senate and Assembly.

§ 2. The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of one hundred and fifty members. The assemblymen elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years.

§ 3. The senate districts described in section three of article three of this constitution as adopted by the people on November sixth, eighteen hundred ninety-four are hereby continued for all of the purposes of future reapportionments of senate districts pursuant to section four of this article.*

§ 4. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes,

* As amended on November 6, 1962, effective January 1, 1963, McKinneys Consolidated Laws, Const. Art. III §3 (1963 Supp.). Prior to this amendment the Constitution contained a geographic description of the fifty senate districts under the 1894 apportionment. See Jurisdictional Statement, App. B, pp. 3b-10b. This amendment merely shortened and simplified the Constitution by incorporating this description by reference and made no relevant substantive change in the apportionment formula or procedures.

the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabit-

ants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and

the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators, for full terms beginning at such expirations, and for the formation of assembly districts.

§ 5. The members of the assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, includ-

ing Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

The assembly districts, including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause

to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town at any time on or before March first, nineteen hundred forty-six. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, except a town having more than a ratio of apportionment and one-half over, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any districts contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in

number of inhabitants, excluding aliens. Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.

State Statutes: State Law, Sections 120-124

§ 120. Present senate districts

The senate districts of this state, as existing immediately before the enactment of this article, shall continue to be the senate districts of the state until the expiration of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations and for the formation of assembly districts.

§ 121. New senate districts

Except as provided in section one hundred twenty, the senate districts of this state from and after the time this article takes effect, shall consist as follows:

First. The first senate district shall consist of the county of Suffolk.

Second. The second senate district shall consist of that part of the county of Nassau within and bounded by a line beginning at a point where the dividing line between the town of Hempstead and the town of North Hempstead is intersected by Clinton Road (Glen Cove Road) and the easterly boundary line of the incorporated village of Garden City, thence southerly along the boundary line of the incorporated village of Garden City to the dividing line between the incorporated village of Garden City and the incorporated village of Hempstead, thence in a westerly and southerly direction along said dividing line to the easterly boundary line of the incorporated village of Rockville Centre, thence southerly and westerly along said boundary line to the easterly boundary line of the incorporated village of East Rockaway, thence southerly along said boundary line to Station Plaza, to Atlantic avenue, to the intersection of Atlantic avenue, Nassau avenue and Bayside avenue, thence along Bayside avenue to Messick avenue, to Ebert avenue (Anchor street), to Yost Parkway, to Perkins avenue, to Messick avenue, to Oceanside Parkway (Weidner avenue), to Lawson Boulevard, thence along Lawson Boulevard and Lawson Boulevard extended to the waters of Simonson Channel and through the waters of Simonson Channel, Barnum Island Channel and Hog Island Creek to Reynolds Channel, thence westerly through the waters of Reynolds Channel to the dividing line between the county of Nassau and the county of Queens, thence northerly along said dividing

line to the intersection of said dividing line with the dividing line between the county of Queens, the town of Hempstead and the town of North Hempstead, thence easterly along the dividing line between the town of Hempstead and the town of North Hempstead to the place of beginning.

Third. The third senate district shall consist of that part of the county of Nassau which includes the town of North Hempstead, the town of Oyster Bay and the City of Glen Cove; also that portion of the town of Hempstead described as follows: beginning at a point where Bethpage Turnpike intersects the dividing line between the town of Oyster Bay and the town of Hempstead, thence in a westerly direction along Bethpage Turnpike to North Wantagh avenue, thence northerly to Boone street, to Farmedge Road, to the intersection of Farmedge Road and Henry street, thence along Henry street to Maple avenue (Edna avenue), to Jupiter Lane, to Farmedge Road, to Bloomingdale Road (Solar Lane), to Constable Lane, to Marksman Lane, to Barrister Road, to Welder Lane, to Coppersmith Road, to Coachman Lane, to Poet Lane, to the dividing line between the town of Hempstead and the town of Oyster Bay and thence easterly and southerly along said dividing line to the place of beginning.

Fourth. The fourth senate district shall consist of that part of the county of Nassau within and bounded by a line beginning at a point where the dividing line between the town of Hempstead and the town of North Hempstead is intersected by Clinton Road (Glen Cove Road) and the

easterly boundary line of the incorporated village of Garden City, thence southerly along said boundary line of the incorporated village of Garden City to the dividing line between the incorporated villages of Garden City and Hempstead, thence in a westerly and southerly direction along said dividing line to the easterly boundary line of the incorporated village of Rockville Centre, thence southerly and westerly along said boundary line to the easterly boundary line of the incorporated village of East Rockaway, thence southerly along said boundary line to Station Plaza, to Atlantic avenue, to the intersection of Atlantic avenue, Nassau avenue and Bayside avenue, thence along Bayside avenue to Messick avenue, to Ebert avenue (Anchor street), to Yost Parkway, to Perkins avenue, to Messick avenue, to Oceanside Parkway (Weidner avenue), to Lawson Boulevard, thence along Lawson Boulevard and Lawson Boulevard extended to the waters of Simonson Channel and through the waters of Simonson Channel, Barnum Island Channel and Hog Island Creek to Reynolds Channel, thence westerly through the waters of Reynolds Channel to the Atlantic Ocean, thence easterly through the waters of the Atlantic Ocean to the dividing line extended between the town of Oyster Bay and the town of Hempstead, thence northerly along said dividing line extended and said dividing line to Bethpage Turnpike, thence westerly along Bethpage Turnpike to North Wantagh avenue, thence northerly to Boone street, to Farmedge Road, to the intersection of Farmedge Road and Henry street, thence along Henry street to Maple avenue (Edna avenue), to Jupiter Lane, to Farmedge Road, to Bloomingdale Road (Solar Lane), to Constable Lane, to Marksman Lane, to Barrister Road, to Welder

Lane, to Coppersmith Road, to Coachman Lane, to Poet Lane, to the dividing line between the town of Hempstead and the town of Oyster Bay, thence westerly and northerly along said dividing line to the intersection of the town lines of Oyster Bay, North Hempstead and Hempstead, thence westerly along the dividing line between the town of North Hempstead and the town of Hempstead to the place of beginning; including the city of Long Beach.

Fifth. The fifth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Utopia Parkway extended intersects the waters of the East River, thence southerly along Utopia Parkway extended and Utopia Parkway to the intersection of Utopia Parkway with One Hundred and Sixty-ninth street, thence along One Hundred and Sixty-ninth street to Thirty-second avenue, to One Hundred and Sixty-eighth street, to Crocheron avenue, thence westerly along Crocheron avenue to Northern Boulevard, to Parsons Boulevard, thence southerly along Parsons Boulevard to Forty-fifth avenue, to Kissena Boulevard, to Elder avenue, to One Hundred and Thirty-third street, to North Hempstead Turnpike, thence easterly to One Hundred and Forty-first street, to Fifty-eighth avenue, to Main street, to Fifty-eighth Road, to One Hundred and Forty-second street, to Fifty-ninth avenue, to One Hundred and Forty-eighth street, to Sixtieth avenue, to One Hundred and Fiftieth street, to Horace Harding Boulevard, to One Hundred and Sixty-fourth street, thence southerly along One Hundred and Sixty-fourth street to Hillside avenue, to One Hundred and Sixty-third street, to Jamaica avenue, thence easterly to Hollis avenue, to Farmers Boulevard, thence southerly to One Hundred and

Twenty-second avenue, to Springfield Boulevard, to One Hundred and Twenty-first avenue, thence easterly along One Hundred and Twenty-first avenue and Francis Lewis Boulevard to the dividing line between the county of Queens and the county of Nassau, thence northerly along said dividing line to the waters of Little Neck Bay, thence westerly through the waters of Little Neck Bay, Long Island Sound and the East River to the place of beginning.

Sixth. The sixth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Glenmore avenue intersects the dividing line between the county of Queens and the county of Kings, thence easterly along Glenmore avenue to Seventy-sixth street, to Liberty avenue, to One Hundred and Second Road, thence along One Hundred and Second Road to Eighty-fourth street, to One Hundred and Second avenue, to Eighty-sixth street, to One Hundred and First avenue, to Ninety-third street, to Ninety-seventh avenue, to One Hundredth street, to Ninety-fifth avenue, to One Hundred and Tenth street, to Ninety-fifth avenue, to Lefferts Boulevard, to Eighty-ninth avenue, to One Hundred and Thirtieth street, to Jamaica avenue, to One Hundred and Fiftieth street, to Hillside avenue, to One Hundred and Sixty-third street, to Jamaica avenue, to Hollis avenue, to Farmers Boulevard, thence southerly to One Hundred and Twenty-second avenue, to Springfield Boulevard, to One Hundred and Twenty-first avenue, thence easterly along One Hundred and Twenty-first avenue and Francis Lewis Boulevard to the dividing line between the county of Queens and the county of Nassau, thence southerly along said dividing line as it winds and turns to the waters of the Atlantic Ocean and westerly through the waters of the Atlantic Ocean to the dividing

line between the county of Queens and the county of Kings, thence northerly along said dividing line as it winds and turns to the place of beginning.

Seventh. The seventh senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Glenmore avenue intersects the dividing line between the county of Queens and the county of Kings, thence easterly along Glenmore avenue to Seventy-sixth street, to Liberty avenue, to One Hundred and second Road, thence along One Hundred and Second Road to Eighty-fourth street, to One Hundred and Second avenue, to Eighty-sixth street, to One Hundred and First avenue, to Ninety-third street, to Ninety-seventh avenue, to One Hundredth street, to Ninety-fifth avenue, to One Hundred and Tenth street, to Ninety-fifth avenue, to Lefferts Boulevard, to Eighty-ninth avenue, to One Hundred and Thirtieth street, to Jamaica avenue, to One Hundred and Fiftieth street, to Hillside avenue, to One Hundred and Sixty-fourth street, thence northerly to Seventy-first avenue, thence westerly to Kissena Boulevard, to Seventieth Road, to One Hundred and Fifty-third street, to Jewel avenue, and thence westerly along Jewel Avenue to Sixty-ninth Road, to Grand Central Parkway, to Jewel avenue, to One Hundred and Eighth street, to Sixty-seventh avenue, thence along Sixty-seventh avenue (Roxton street) to Thornton Place, to Sixty-sixth avenue (Fleet street), thence westerly along Sixty-sixth avenue (Fleet street) to Alderton street, thence northerly along Alderton street to Woodhaven Boulevard, to Eighty-sixth street, to Sixtieth avenue, to Eighty-sixth street, to Fifty-eighth avenue, to Eighty-fourth street, to Fifty-seventh avenue, to Eighty-third street, to Fifty-fourth avenue, to Eighty-second street, to Grand avenue, to Mazeau street,

to Caldwell avenue, to sixty-ninth street, to Sixty-third avenue, to Sixty-ninth Place, to Sixty-ninth street, to Metropolitan avenue, thence westerly along Metropolitan avenue to the dividing line between the county of Queens and the county of Kings and southerly along said dividing line as it winds and turns to the place of beginning.

Eighth. The eighth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Utopia Parkway extended intersects the waters of the East River, then southerly along Utopia Parkway extended and Utopia Parkway to the intersection of Utopia Parkway with One Hundred and Sixty-ninth street, thence along One Hundred and Sixty-ninth street to Thirty-second avenue, to One Hundred and Sixty-eighth street, to Crocheron avenue, thence westerly along Crocheron avenue to Northern Boulevard, to Parsons Boulevard, thence southerly along Parsons Boulevard to Forty-fifth avenue, to Kissena Boulevard, to Elder avenue, to One Hundred and Thirty-third street, to North Hempstead Turnpike, thence easterly to One Hundred and Forty-first street, to Fifty-eighth avenue, to Main street, to Fifty-eighth Road, to One Hundred and Forty-second street, to Fifty-ninth avenue, to One Hundred and Forty-eighth street, to Sixtieth avenue, to One Hundred and Fiftieth street, to Horace Harding Boulevard, to One Hundred and Sixty-fourth street, thence southerly along One Hundred and Sixty-fourth street to Seventy-first avenue, thence westerly to Kissena Boulevard, to Seventieth Road, to One Hundred and Fifty-third street, to Jewel avenue, and thence westerly along Jewel avenue to Sixty-ninth Road, to Grand Central Parkway, to Jewel Avenue, to One Hundred and Eighth street, to Sixty-seventh avenue, thence along Sixty-seventh avenue

to Ninety-ninth street, thence northerly along Ninety-ninth street to Sixty-fourth avenue, to Ninety-eighth street, to Horace Harding Boulevard, to Ninety-seventh street, to Fifty-seventh avenue, to Ninety-sixth street, to Christie avenue, to Junction Boulevard, to Fifty-first avenue, to Ninety-second street, to Fifty-second avenue, to Ninetieth street, to Fifty-first avenue, to Broadway, to Pettit Place, to Layton street, to Baxter avenue, to Broadway, to Brooklyn-Queens Connecting Highway, thence northerly along Brooklyn-Queens Connecting Highway to Astoria Boulevard South, to the intersection of Astoria Boulevard South, Thirty-first street and Hoyt avenue South at Columbus Square, thence westerly along Hoyt avenue South to the waters of the East River and the dividing line between the county of Queens and the county of New York, thence northerly along said dividing line to the dividing line between the county of Queens and the county of Bronx, thence easterly along said dividing line to the place of beginning.

Ninth. The ninth senate district shall consist of that part of the county of Queens within and bounded by a line beginning at a point where Metropolitan avenue intersects the dividing line between the county of Queens and the county of Kings, thence easterly along Metropolitan avenue to Sixty-ninth street, northerly to Sixty-ninth Place, to Sixty-third avenue, to Sixty-ninth street, to Caldwell avenue, to Mazeau street, to the intersection of Mazeau street, Fifty-seventh avenue and Grand avenue, thence along Grand avenue to Eighty-second street, to Fifty-fourth avenue, to Eighty-third street, to Fifty-seventh avenue, to Eighty-fourth street, to Fifty-eighth avenue, to Eighty-sixth street, to Sixtieth avenue to Eighty-sixth street, to Woodhaven Boulevard, to Alderton

street, to Sixty-sixth avenue (Fleet street), to Thornton Place, to Sixty-seventh avenue (Roxton street), to Ninety-ninth street, thence northerly along Ninety-ninth street to Sixty-fourth avenue, to Ninety-eighth street, to Horace Harding Boulevard, to Ninety-seventh street, to Fifty-seventh avenue, to Ninety-sixth street, to Christie avenue, to Junction Boulevard, to Fifty-first avenue, to Ninety-second street, to Fifty-second avenue, to Ninetieth street, to Fifty-first avenue, to Broadway, to Pettit Place, to Layton street, to Baxter avenue, to Broadway, to Brooklyn-Queens Connecting Highway, thence northerly along Brooklyn-Queens Connecting Highway to Astoria Boulevard South, to the intersection of Astoria Boulevard South, Thirty-first street and Hoyt avenue South at Columbus Square, thence westerly along Hoyt avenue South to the waters of the East River, thence southerly through Hell Gate and East Channel in the East River to Newton Creek and the dividing line between the county of Queens and the county of Kings, thence easterly along said dividing line to the place of beginning.

Tenth. The tenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Johnson avenue intersects the dividing line between the county of Kings and the county of Queens, thence westerly along Johnson avenue to Porter avenue, to Flushing avenue, to the intersection of Flushing avenue, Irving avenue and Melrose street, thence westerly along Melrose street to Wilson avenue, to Jefferson street, to Evergreen avenue, to Jefferson street, to Bushwick avenue, to Troutman street, to Myrtle avenue, to Broadway, thence southerly along Broadway to Stuyvesant avenue, to Willoughby avenue, to Broadway, to Reid avenue, to De Kalb avenue, to Broad-

way, to Patchen avenue, to Van Buren street, to Broadway, to Ralph avenue, to Putnam avenue, to Howard avenue, to the north lane of Atlantic avenue, to Ralph avenue, to the south lane of Atlantic avenue, to Howard avenue, to St. Marks avenue, thence easterly along St. Marks avenue to the intersection of St. Marks avenue, East New York avenue and Watkins street, thence along East New York avenue to Watkins street, to Liberty avenue, to Alabama avenue, to Atlantic avenue, to Georgia avenue, thence southerly to Belmont avenue, to Pennsylvania avenue, to Sutter avenue, to New Jersey avenue, to Linden Boulevard, to Pennsylvania avenue, to Vandalia avenue, thence along Vandalia avenue and Vandalia avenue extended to the waters of Fresh Creek Basin and through the waters of Fresh Creek Basin, Jamaica Bay, Big Channel and Rockaway Inlet to the dividing line between the county of Kings and the county of Queens, thence easterly and northerly along said dividing line to the place of beginning; including the islands in Jamaica Bay within the county of Kings.

Eleventh. The eleventh senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Eastern Parkway intersects Grand Army Plaza, thence easterly along Eastern Parkway to Franklin avenue, to St. Johns Place, to Rogers avenue, to Park Place, to Troy avenue, to Prospect Place, to Schenectady avenue, to Park Place, to Utica avenue, to St. Marks avenue, to Rochester avenue, to Prospect Place, to Buffalo avenue, to Park Place, to Ralph avenue, to St. Marks avenue, to Howard avenue, to the south lane of Atlantic avenue, to Ralph avenue, to the north lane of Atlantic avenue, to Howard avenue, thence northerly along Howard avenue to Putnam avenue, to Ralph avenue, to Broadway, to Van Buren street, to Patchen avenue, to

Broadway, to De Kalb avenue, to Reid avenue, to Broadway, to Willoughby avenue, to Stuyvesant avenue, to Broadway, to Myrtle avenue, thence westerly along Myrtle avenue to Throop avenue, to Vernon avenue, to Tompkins avenue, to Willoughby avenue, to Nostrand avenue, to Willoughby avenue, to Bedford avenue, to De Kalb avenue, to Flatbush avenue Extension, thence southerly along Flatbush avenue Extension to Fulton street, to Rockwell Place (Ninety-fourth street), to Lafayette avenue, to Flatbush avenue, thence southerly along Flatbush avenue to and around Grand Army Plaza to the place of beginning.

Twelfth. The twelfth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where East Twenty-fourth street intersects Quentin Road, thence easterly along Quentin Road to Nostrand avenue, to Gerritsen avenue, to Avenue R, to East Thirty-sixth street, to Flatlands avenue, to Avenue L, to Utica avenue, to Avenue M, to Ralph avenue, to Avenue A, to East Eighty-eighth street, to Ralph avenue, to Church avenue, to Remsen avenue, thence northerly along Remsen avenue to the intersection of Remsen avenue, Lefferts avenue, and Utica avenue, thence along Utica avenue to Eastern Parkway, to Troy avenue, to Park Place, to Rogers avenue, to St. John's Place, to Franklin avenue, to Eastern Parkway, to and around the southern end of Grand Army Plaza to Flatbush avenue, thence southerly along Flatbush avenue to Martense street, to Bedford avenue, to Snyder avenue, to Flatbush avenue, to the intersection of Flatbush avenue, Foster avenue and Bedford avenue, thence along Bedford avenue to Glenwood Road, to East Twenty-third street, to Campus Road, thence westerly, southerly, and easterly along Campus Road to East Twenty-third street, to Ave-

nue I, to East Twenty-fourth street, to Avenue J, to East Twenty-third street, to Avenue K, to East Twenty-fourth street, to Avenue N, to East Twenty-third street, to Olean street, to East Twenty-fourth street, to the place of beginning.

Thirteenth. The thirteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Bay Ridge avenue extended intersects the waters of Upper New York Bay, thence along Bay Ridge avenue extended and Bay Ridge avenue to Shore Road, thence northerly along Shore Road to Ridge avenue (Ridge Boulevard), thence along Ridge avenue and Second avenue to Sixty-fifth street, to Third avenue, to Sixty-third street, to Fourth avenue, to Forty-fifth street, to Fifth avenue, to Thirty-ninth street, to Ninth avenue, to Thirty-seventh street, to Fort Hamilton Parkway, to the intersection of Fort Hamilton Parkway, Prospect Park Southwest, Coney Island avenue and Parkside avenue at Park Circle, thence along Parkside avenue to Flatbush avenue and northerly along Flatbush avenue to and around the eastern side of Grand Army Plaza to Flatbush avenue, to Lafayette avenue, to Rockwell Place (Ninety-fourth street), thence along Rockwell Place (Ninety-fourth street) to Fulton street, to Flatbush avenue, to De Kalb avenue, to the intersection of De Kalb avenue and Fulton street, thence along Fulton street to Duffield street (Fifty-ninth street), to Willoughby street, to Bridge street, to Tillary street, to Duffield street (Fifty-ninth street), to Concord street, to Bridge street, to Prospect street, to Jay street, to Talman street, to Bridge street, thence northerly along Bridge street and Bridge street extended to the waters of the East River and southerly through the waters of the East River, Butter-

milk Channel and Upper New York Bay to the place of beginning.

Fourteenth. The fourteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Bay Ridge avenue extended intersects the waters of Upper New York Bay, thence along Bay Ridge avenue extended and Bay Ridge avenue to Shore Road, thence northerly along Shore Road to Ridge avenue (Ridge Boulevard), thence along Ridge avenue and Second avenue to Sixty-fifth street, to Third avenue, to Sixty-third street, to Fourth avenue, to Forty-fifth street, to Fifth avenue, to Thirty-ninth street, to Ninth avenue, to Forty-first street, to the intersection of Forty-first street, Tenth avenue and New Utrecht avenue, thence southerly along New Utrecht avenue to Thirteenth avenue, thence along Thirteenth avenue to Fifty-sixth street, to New Utrecht avenue, to Sixty-third street, to Seventeenth avenue, to Sixty-second street, to Eighteenth avenue, to Shore Parkway, to Bay Nineteenth street, thence southerly along Bay Nineteenth street and Bay Nineteenth street extended to the waters of Gravesend Bay and northerly through the waters of Gravesend Bay, Lower Bay and Upper New York Bay to the place of beginning.

Fifteenth. The fifteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where West Tenth street extended intersects the waters of the Atlantic Ocean, thence northerly along West Tenth street extended and West Tenth street to Surf avenue, to West Twelfth street, to Neptune avenue, to Shell Road, thence northerly to Triton avenue to West Sixth street, to the intersection of West Sixth street and Shell Road, thence along Shell Road and

McDonald avenue to Avenue U, to West street, to Avenue T, to East Second street, to Avenue P, to East Third street, to Avenue O, to East Fourth street, to Avenue N, to East Fifth street, to Avenue L, to Ocean Parkway, to Eighteenth avenue, to East Fifth street, to Fort Hamilton Parkway, to Thirty-seventh street, to Ninth avenue, to Forty-first street, to the intersection of Forty-first street, Tenth avenue and New Utrecht Avenue, thence southerly along New Utrecht avenue to Thirteenth avenue thence along Thirteenth avenue to Fifty-sixth street, to New Utrecht avenue, to Sixty-third street, to Seventeenth avenue, to Sixty-second street, to Eighteenth avenue, to Shore Parkway, to Bay Nineteenth street, thence southerly along Bay Nineteenth street and Bay Nineteenth street extended to the waters of Gravesend Bay and southerly through the waters of Gravesend Bay, Lower New York Bay and the Atlantic Ocean to the place of beginning.

Sixteenth. The sixteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Bedford avenue extended intersects the waters of Sheepshead Bay, thence northerly along Bedford avenue extended and Bedford avenue to Shore Parkway, to East Twenty-third street, to Voorhies avenue, to East Twenty-fourth street, to Quentin Road, thence easterly along Quentin Road to Nostrand avenue, to Gerritsen avenue, to Avenue R, to East Thirty-sixth street, to Flatlands avenue, to Avenue L, to Utica avenue, to Avenue M, to Ralph avenue, to Avenue A, to East Eighty-eighth street, to Ralph avenue, to Church avenue, to Remsen avenue, thence northerly along Remsen avenue to the intersection of Remsen avenue, Lefferts avenue and Utica avenue, thence along Utica avenue to Eastern Parkway, to Troy avenue, to Prospect Place, thence easterly

along Prospect Place to Schenectady avenue, to Park Place, to Utica avenue, to St. Marks avenue, to Rochester avenue, to Prospect Place, to Buffalo avenue, to Park Place, to Ralph avenue, to St. Marks avenue, to the intersection of St. Marks avenue, East New York avenue and Watkins street, thence along East New York avenue to Watkins street, to Liberty avenue, to Alabama avenue, to Atlantic avenue, to Georgia avenue, thence southerly to Belmont avenue, to Pennsylvania avenue to Sutter avenue, to New Jersey avenue, to Linden Boulevard, to Pennsylvania avenue, to Vandalia avenue, thence westerly along Vandalia avenue and Vandalia avenue extended to the waters of Fresh Creek Basin and through the waters of Fresh Creek Basin, Jamaica Bay Big Channel and Rockaway Inlet to Sheepshead Bay and to the place of beginning.

Seventeenth. The seventeenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where West Tenth street extended intersects the waters of the Atlantic Ocean, thence northerly along West Tenth street extended and West Tenth street to Surf avenue, to West Twelfth street, to Neptune avenue, to Shell Road, thence northerly to Triton avenue, to West Sixth street, to the intersection of West Sixth street and Shell Road, thence along Shell Road and McDonald avenue to Avenue U, to West street, to Avenue T, to East Second street, to Avenue P, to East Third street, to Avenue O, to East Fourth street, to Avenue N, to East Fifth street, to Avenue L, to Ocean Parkway, to Eighteenth avenue, to East Fifth street, to Fort Hamilton Parkway, to the intersection of Fort Hamilton Parkway, Prospect Park Southwest, Coney Island avenue and Parkside avenue at Park Circle, thence along Parkside

avenue to Flatbush avenue, to Martense street, to Bedford avenue, to Snyder avenue, to Flatbush avenue, thence southerly along Flatbush avenue to the intersection of Flatbush avenue, Foster avenue and Bedford avenue, thence along Bedford avenue to Glenwood Road, to East Twenty-third street, to Campus Road, thence westerly, southerly, and asterly along Campus Road, to East Twenty-third street, to Avenue I, to East Twenty-fourth street, to Avenue J, to East Twenty-third street, to Avenue K, to East Twenty-fourth street, to Avenue N, to East Twenty-third street, to Olean street, to East Twenty-fourth street, to Voorhies avenue, to East Twenty-third street, to Shore Parkway, to Bedford avenue, thence southerly along Bedford avenue and Bedford avenue extended to the waters of Sheepshead Bay and through the waters of Sheepshead Bay, Rockaway Inlet and the Atlantic Ocean to the place of beginning.

Eighteenth. The eighteenth senate district shall consist of that part of the county of Kings within and bounded by a line beginning at a point where Johnson avenue intersects the dividing line between the county of Kings and the county of Queens, thence westerly along Johnson avenue to Porter avenue, to Flushing avenue, to the intersection of Flushing avenue, Irving avenue and Melrose street, thence westerly along Melrose street to Wilson avenue, to Jefferson street, to Evergreen avenue, to Jefferson street, to Bushwick avenue, to Troutman street, to Myrtle avenue, to Throop avenue, to Vernon avenue, to Tompkins avenue, to Willoughby avenue, to Nostrand avenue, to Willoughby avenue, to Bedford avenue, to De-Kalb avenue, to the intersection of De Kalb avenue and Fulton street, thence along Fulton street to Duffield street (Fifty-ninth street), to Willoughby street, to Bridge

street, to Tillary street, to Duffield street (Fifty-ninth street), to Concord street, to Bridge street, to Prospect street, to Jay street, to Talman street, to Bridge street, thence northerly along Bridge street and Bridge street extended to the waters of the East River and northerly through the waters of the East River to the waters of Newtown Creek and the dividing line between the county of Kings and the county of Queens, thence southerly along said dividing line to the place of beginning.

Nineteenth. The nineteenth senate district shall consist of the county of Richmond.

Twentieth. The twentieth senate district shall consist of that part of the county of New York within and bounded by a line beginning at the point where East Forty-first street extended intersects the waters of the East River, thence westerly along East Forty-first street extended and East Forty-first street to First avenue, to East Fortieth street, to Third avenue, to East Thirty-third street, to Lexington avenue, to East Twenty-sixth street, to Third avenue, to East Tenth street, to Fourth avenue, to Wanamaker Place at East Ninth street, thence easterly along East Ninth street to Third avenue, thence southerly along Third avenue and through Cooper Square to the Bowery, thence along the Bowery to East Fourth street, to Lafayette street, to Houston street, thence westerly along Houston street and West Houston street to Hudson street, to the intersection of Hudson street and Eighth avenue at Abingdon Square, thence along Eighth avenue to West Fourteenth street, to Seventh avenue, to West Twenty-fourth street, to Eighth avenue, to West Thirty-first street, to Seventh avenue, to West Thirty-fourth street, to Eighth avenue, to West Thirty-eighth street, to Seventh avenue, to West Thirty-ninth street, to

Eighth avenue, to West Fortieth street, to Seventh avenue, to West Fiftieth street, to Avenue of the Americas, to West Fifty-fourth street, to Eighth avenue, to West Fifty-fifth street, to Ninth avenue, thence along Ninth avenue and Columbus avenue to West Sixty-first street, to Central Park West, thence northerly along Central Park West to Cathedral Parkway at West One Hundred and Tenth street, thence easterly along Cathedral Parkway and West One Hundred and Tenth street to Fifth avenue, to East One Hundredth street, to Madison avenue, to East Ninety-eighth street, to Park avenue, to East Ninety-sixth street, to Lexington avenue, to East Ninety-fourth street, to Third avenue, to East Eighty-ninth street, to Lexington avenue, to East Eighty-seventh street, to Third avenue, to East Eighty-fourth street, to Lexington avenue, to East Eighty-second street, to Third avenue, to East Eightieth street, to Second avenue, to East Seventy-fifth street, to First avenue, to East Seventy-fourth street, to York avenue, thence northerly along York avenue to East Eighty-second street, to East End avenue, to East Eighty-fourth street and Gracie Square, thence easterly along Gracie Square and Gracie Square extended to the waters of the East River and southerly through the waters of the East River to the place of beginning; including Welfare Island.

Twenty-first. The twenty-first senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where West One Hundredth street extended intersects the waters of the Hudson River, thence easterly along West One Hundredth street extended and West One Hundredth street to West End avenue, to West One Hundred and First street, to Broadway, to West One Hundred and Second street, to

Amsterdam avenue, to West Ninety-seventh street, to Central Park West, thence northerly along Central Park West and Eighth avenue to West One Hundred and Eighteenth street, to Lenox avenue, to West One Hundred and Seventeenth street thence along West One Hundred and Seventeenth street and East One Hundred and Seventeenth street to Madison avenue, to East One Hundred and Nineteenth street, to Park avenue, to East One Hundred and Twentieth street, to Madison avenue, to East One Hundred and Twenty-fourth street, to Fifth avenue, to East One Hundred and Twenty-fifth street, to Madison avenue, to East One Hundred and Twenty-seventh street, to Fifth avenue, to East One Hundred and Thirtieth street, to Madison avenue, to East One Hundred and Thirty-second street, to Fifth avenue, to West One Hundred and Thirty-fourth street, to Seventh avenue, to West One Hundred and Thirty-third street, to St. Nicholas avenue, to Edgecombe avenue, to West One Hundred and Thirty-seventh street, to St. Nicholas avenue, to West One Hundred and Fifty-second street, to Amsterdam avenue, to West One Hundred and Fifty-third street, to Broadway, to Fort Washington avenue, to West One Hundred and Sixty-first street, thence westerly along West One Hundred and Sixty-first street and West One Hundred and Sixty-first street extended to the waters of the Hudson River and southerly through the waters of the Hudson River to the place of beginning.

Twenty-second. The twenty-second senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where East One Hundred and Thirty-fifth street extended intersects the waters of the Harlem River, thence westerly along East One Hundred and Thirty-fifth street extended and

East One Hundred and Thirty-fifth street to Madison avenue, to East One Hundred and Thirtieth street, to Fifth avenue, to East One Hundred and Twenty-seventh street, to Madison avenue, to East One Hundred and Twenty-fifth street, to Fifth avenue, to East One Hundred and Twenty-fourth street, to Madison avenue, to East One Hundred and Twentieth street, to Park avenue, to East One Hundred and Nineteenth street, to Madison avenue, to East One Hundred and Seventeenth street, thence westerly along East One Hundred and Seventeenth street and West One Hundred and Seventeenth street to Lenox avenue, to West One Hundred and Eighteenth street, to Eighth avenue, to Cathedral Parkway at West One Hundred and Tenth street, thence easterly along Cathedral Parkway and West One Hundred and Tenth street to Fifth avenue, to East One Hundredth street, to Madison avenue, to East Ninety-eighth street, to Park avenue, to East Ninety-sixth street, to Lexington avenue, to East Ninety-fourth street, to Third avenue, to East Eighty-ninth street, to Lexington avenue, to East Eighty-seventh street, to Third avenue, to East Eighty-fourth street, to Lexington avenue, to East Eighty-second street, to Third avenue, to East Eightieth street, to Second avenue, to East Seventy-fifth street, to First avenue, to East Seventy-fourth street, to York avenue, thence northerly along York avenue to East Eighty-second street, to East End avenue, to East Eighty-fourth street and Gracie Square, thence easterly along Gracie Square and Gracie Square extended to the waters of the East River, thence northerly through the waters of the East River and the Harlem River to the place of beginning; including Randall's Island, Ward's Island, Sunken Meadow Island and Mill Rocks Island.

Twenty-third. The twenty-third senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where East One Hundred and Thirty-fifth street extended intersects the waters of the Harlem River, thence westerly along East One Hundred and Thirty-fifth street extended and East One Hundred and Thirty-fifth street to Madison avenue, to East One Hundred and Thirty-second street, to Fifth avenue, to West One Hundred and Thirty-fourth street, to Seventh avenue, to West One Hundred and Thirty-third street, to St. Nicholas avenue, to Edgecombe avenue, to West One Hundred and Thirty-seventh street, to St. Nicholas avenue, to West One Hundred and Fifty-second street, to Amsterdam avenue, to West One Hundred and Fifty-third street, to Broadway, to Fort Washington avenue, to West One Hundred and Sixty-first street, thence westerly along West One Hundred and Sixty-first street and West One Hundred and Sixty-first street extended to the waters of the Hudson River, thence northerly through the waters of the Hudson River to the Harlem River and the dividing line between the county of New York and the county of Bronx, thence easterly and southerly along said dividing line as it winds and turns to the place of beginning.

Twenty-fourth. The twenty-fourth senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where East Forty-first street extended intersects the waters of the East River, thence westerly along East Forty-first street extended and East Forty-first street to First avenue, to East Fortieth street, to Third avenue, to East Thirty-third street, to Lexington avenue, to East Twenty-sixth street, to Third avenue, to East Tenth street, to Fourth

avenue, to Wanamaker Place at East Ninth street, thence easterly along East Ninth street to Third avenue, thence southerly along Third avenue and through Cooper Square to the Bowery, thence along the Bowery to East Fourth street, to Lafayette street, to Houston street, thence westerly along Houston street and West Houston street to Hudson street, to Bethune street, to Greenwich street, to West Twelfth street, to Hudson street, to Horatio street, to Washington street, to West Fourteenth street, to Tenth avenue, thence southerly along Tenth avenue to Bloomfield street thence westerly along Bloomfield street and Bloomfield street extended to the waters of the Hudson River, thence through the waters of the Hudson River, Upper Bay, Buttermilk Channel and the East River to the place of beginning; including Ellis Island, Governor's Island and Bedloe's Island.

Twenty-fifth. The twenty-fifth senate district shall consist of that part of the county of New York within and bounded by a line beginning at a point where Bloomfield street extended intersects the waters of the Hudson River, thence easterly along Bloomfield street extended and Bloomfield street to Tenth avenue, to West Fourteenth street to Washington street, to Horatio street, to Hudson street, to West Twelfth street, to Greenwich street, to Bethune street, to Eighth avenue, to West Fourteenth street to Seventh avenue, to West Twenty-fourth street, to Eighth avenue, to West Thirty-first street, to Seventh avenue, to West Thirty-fourth street to Eighth avenue, to West Thirty-eighth street, to Seventh avenue, to West Thirty-ninth street, to Eighth avenue to West Fortieth street, to Seventh avenue, to West Fiftieth street, to Avenue of the Americas, to West Fifty-fourth street to Eighth avenue, to West Fifty-fifth street, to Ninth avenue, thence

along Ninth avenue and Columbus avenue to West Sixty-first street, to Central Park West, thence northerly along Central Park West to West Ninety-seventh street, to Amsterdam avenue, to West One Hundred and Second street, to Broadway, to West One Hundred and First street, to West End avenue, to West One Hundredth street, thence westerly along West One Hundredth street and West One Hundredth street extended to the waters of the Hudson River and southerly through the waters of the Hudson River to the place of beginning.

Twenty-sixth. The twenty-sixth senate district shall consist of that part of the county of Bronx within and bounded by a line beginning at a point where St. Ann's avenue extended intersects Bronx Kills in the Harlem River, thence northerly along St. Ann's avenue extended and St. Ann's avenue to East One Hundred and Forty-seventh street, to Brook avenue, to East One Hundred and Fifty-sixth street, to Third avenue, to East One Hundred and Fifty-eighth street, to Brook avenue, to East One Hundred and Fifty-ninth street, to St. Ann's avenue, to the intersection of St. Ann's avenue, Third avenue and Boston Road, thence along Boston Road to the intersection of Boston Road, Jefferson Place and Crotona avenue, thence along Crotona avenue to East One Hundred and Seventieth street, to Clinton avenue, to Crotona Park South, to Fulton avenue, to East One Hundred and Seventy-fifth street, to Third avenue, to East Tremont avenue, thence westerly along East Tremont avenue and West Tremont avenue to the Harlem River and southerly through the waters of the Harlem River to the place of beginning.

Twenty-seventh. The twenty-seventh senate district shall consist of that part of the county of Bronx within

and bounded by a line beginning at a point where St. Ann's avenue extended intersects Bronx Kills in the Harlem River, thence northerly along St. Ann's avenue extended and St. Ann's avenue to East One Hundred and Forty-seventh street, to Brook avenue, to East one Hundred and Fifty-sixth street, to Third avenue, to East One Hundred and Fifty-eighth street, to Brook avenue, to East One Hundred and Fifty-ninth street, to St. Ann's avenue, to the intersection of St. Ann's avenue, Third avenue and Boston Road, thence along Boston Road to the intersection of Boston Road, Jefferson Place and Crotona avenue, thence along Crotona avenue to East one Hundred and seventieth street, to Clinton avenue, to Crotona Park South, to Fulton avenue, to East One Hundred and Seventy-fifth street, to Third avenue, to East Tremont avenue, thence southeasterly along East Tremont avenue to Bronx Park avenue, to East One Hundred and Eightieth street, to Morris Park avenue, thence southerly along Morris Park avenue and Morris Park avenue extended to East One Hundred and Seventy-seventh street, to Rosedale avenue, to East One Hundred and Seventy-second street, to Noble avenue, to Watson avenue, to the intersection of Watson avenue, Metcalf avenue and Sound View avenue at Ludlow Square, thence along Sound View avenue to Lafayette avenue, to Beach avenue, to Bronx River avenue, to Underhill avenue, thence along Underhill avenue and Underhill avenue extended to the East River and westerly through the waters of the East River to the place of beginning; including Riker's Island, North Brother Island and South Brother Island.

Twenty-eighth. The twenty-eighth senate district shall consist of that part of the county of Bronx within and bounded by a line beginning at a point where West

Tremont avenue extended intersects the Harlem River, thence easterly along West Tremont avenue extended, West Tremont avenue and East Tremont avenue to Bronx Park avenue, to East One Hundred and Eightieth street, to Morris Park avenue, thence northerly along Morris Park avenue to Amethyst street, to Rhinelander avenue, to Amethyst street, to Sagamore street, to Unionport Road, to the intersection of Unionport Road, Bronx Park East and Bronxdale avenue, thence along Bronxdale avenue to Cruger Avenue, to Brady avenue, to Bogart avenue, to Woodmansten Place, to Paulding avenue, to Westchester Esplanade, and thence northerly along Westchester Esplanade to Bronx and Pelham Parkway, to the intersection of Bronx and Pelham Parkway, Williamsbridge Road and Laconia avenue, thence along Laconia avenue to Mace avenue, to Ten Broeck avenue, to Allerton avenue, to Throop avenue, to Adee avenue, to Bouck avenue, to Burke avenue, to Yates avenue, to Boston Road, to Burke avenue, to Cruger avenue, to Magenta street, to Holland avenue, to Gun Hill Road, thence westerly along Gun Hill Road to Olinville avenue, to Duncomb street and Duncomb street extended to Bronx River Parkway, thence southerly along Bronx River Parkway to East Two Hundred and Fourth street extended, thence westerly along East Two Hundred and Fourth street extended and East Two Hundred and Fourth street to Webster avenue, to East One Hundred and Ninety-ninth street, to Decatur avenue, to East Two Hundred and First street, to Marion avenue, to Bedford Park Boulevard, thence along Bedford Park Boulevard to Villa avenue, to East Two Hundred and Fourth street, thence easterly along East Two Hundred and Fourth street to East Mosholu Parkway South, thence southerly to Bainbridge avenue, thence along Bainbridge avenue and

East Two Hundred and Fifth street to Hull avenue, to East Two Hundred and Ninth street, to Decatur avenue, to Gun Hill road, thence westerly along Gun Hill Road to Jerome avenue, to West Mosholu Parkway North, to West Gun Hill Road, thence westerly along West Gun Hill Road and Van Cortlandt Park South to Major Deegan Expressway, to West Two Hundred and Thirty-ninth street, to Broadway, to West Two Hundred and Tirty-eighth street, to Bailey avenue, to Major Deegan Expressway (Albany Crescent), to West Two Hundred and Thirty-first street, to Bailey avenue, to West Kingsbridge Road, thence westerly along West Kingsbridge Road to the dividing line between the county of New York and the county of Bronx, thence southerly along said dividing line and through the Harlem River to the place of beginning.

Twenty-ninth. The twenty-ninth senate district shall consist of that part of the county of Bronx within and bounded by a line beginning at a point where Underhill avenue extended intersects the East River, thence along Underhill avenue extended and Underhill avenue to Bronx River avenue to Beach avenue, to Lafayette avenue, to Sound View avenue, thence along Sound View avenue through Ludlow Square to the intersection of Metcalf avenue, Sound View avenue and Watson avenue, thence along Watson avenue to Noble avenue, to East One Hundred and Seventy-second street, to Rosedale avenue, to East One Hundred and Seventy-seventh street, to Morris Park avenue extended, thence along Morris Park avenue extended to Morris Park avenue to Amethyst street, to Rhinelander avenue, to Amethyst street, to Sagamore street, to Unionport Road, to the intersection of Unionport Road, Bronx Park East and Bronxdale avenue, thence along Bronxdale avenue to Cruger avenue, to

Brady avenue, to Bogart avenue to Woodmansten Place, to Paulding avenue, to Westchester Esplanade, and thence northerly along Westchester Esplanade to Bronx and Pelham Parkway, to the intersection of Bronx and Pelham Parkway, Williamsbridge Road and Laconia avenue, thence along Laconia avenue to Mace avenue, to Ten Broeck avenue, to Allerton avenue, to Throop avenue, to Adee avenue, to Bouck avenue, to Burke avenue, to Yates avenue, to Boston Road, to Burke avenue, to Cruger avenue, to Magenta street, to Holland avenue, to Gun Hill Road, thence westerly along Gun Hill Road to Olinville avenue, to Duncomb street and Duncomb street extended to the Bronx River Parkway, thence southerly along Bronx River Parkway to East Two Hundred and Fourth street extended, thence westerly along East Two Hundred and Fourth street extended and East Two Hundred and Fourth Street to Webster avenue, to East One Hundred and Ninety-ninth street, to Decatur avenue, to East Two Hundred and First street, to Marion avenue, to Bedford Park Boulevard, thence along Bedford Park Boulevard to Villa avenue, to East Two Hundred and Fourth street, thence easterly along East Two Hundred and Fourth street to East Mosholu Parkway South, thence southerly to Bainbridge avenue, thence along Bainbridge avenue and East Two Hundred and Fifth street to Hull avenue, to East Two Hundred and Ninth street, to Decatur avenue, to Gun Hill Road, thence westerly along Gun Hill Road to Jerome avenue, to West Mosholu Parkway North, to West Gun Hill Road, thence westerly along West Gun Hill Road and Van Courtlandt Park South to Major Deegan Expressway, to West Two Hundred and Thirty-ninth street, to Broadway, to West Two Hundred and Thirty-eighth street, to Bailey avenue, to Major Deegan

Expressway (Albany Crescent) to West Two Hundred and Thirty-first Street, to Bailey avenue, to West Kingsbridge Road, thence westerly along West Kingsbridge Road to the dividing line between the county of New York and the county of Bronx, thence northerly and westerly along said line as it winds and turns to the Harlem River and westerly through the waters of the Harlem River to the Hudson River, thence northerly through the waters of the Hudson River to the Bronx-Westchester county line and easterly along said line to the waters of Long Island Sound, thence southerly through the waters of Long Island Sound and the East River to the place of beginning; including City Island, Hunter's Island, Hart Island, Twin Island, High Island, Middle Reef Island, Rat Island, The Blauzes, Chimney Sweeps, Cuban Ledge, Big Tom, Green Flats, Hog Island, East Nonations, South Nonations, and all other islands in Long Island Sound within the boundary line of the county of Bronx.

Thirtieth. The thirtieth senate district shall consist of that part of Westchester county comprising the town of Pelham, town of Rye, town of Mamaroneck, and the city of New Rochelle, city of Rye, and that portion of the city of Mount Vernon described as follows:

Beginning at the intersection of Mount Vernon avenue with the boundary line between the city of Yonkers and the city of Mount Vernon, thence easterly along Mount Vernon avenue to North Terrace avenue, to Oak street, to North High Street, to Elm street, to West Lincoln avenue, to Howard street, to North High street, to William street, to North Terrace avenue, to West Broad street and westerly along West Broad street to the boundary line between the city of Mount Vernon and the city of Yonkers, thence northerly, easterly, southerly, westerly and north-

erly along the city line of the city of Mount Vernon to the place of beginning.

Thirty-first. The thirty-first senate district shall consist of that part of Westchester county comprising the town of Bedford, town of Cortlandt, town of Harrison, town of Lewisboro, town of Mount Pleasant, town of Newcastle, town of North Castle, town of North Salem, town of Ossining, town of Poundridge, town of Somers, town of Yorktown, town of Scarsdale, town of Eastchester, city of Peekskill and that portion of the city of White Plains described as follows:

Beginning at the intersection of Alexander avenue with the boundary line between the city of White Plains and the town of Greenburgh, thence easterly along Alexander avenue to Chase avenue, to Lee avenue, to Putnam avenue, to Chatterton Parkway, to Hawley street, to Trenton avenue, to Whitney street, to Battle avenue, to Harding avenue, to Chatterton avenue, to Central avenue; to the intersection of Central avenue, Russell street and County Center Road, and thence along County Center Road to the boundary line between the city of White Plains and the town of Greenburgh, thence northerly, easterly, southerly, westerly and northerly along the city line of the city of White Plains to the place of beginning.

Thirty-second. The thirty-second senate district shall consist of that part of Westchester county comprising the city of Yonkers, town of Greenburgh and portions of the cities of Mount Vernon and White Plains, described as follows:

That portion of the city of Mount Vernon beginning at the intersection of Mount Vernon avenue with the boundary line between the city of Yonkers and the city of

Mount Vernon, thence along Mount Vernon avenue to North Terrace avenue, to Oak street, to North High street, to Elm street, to West Lincoln avenue, to Howard street, to North High street, to William street, to North Terrace avenue, to West Broad street and westerly along West Broad street to the boundary line between the city of Mount Vernon and the city of Yonkers, thence southerly along the city line of the city of Mount Vernon to the place of beginning.

Also that portion of the city of White Plains beginning at the intersection of Alexander avenue with the boundary line between the city of White Plains and the town of Greenburgh, thence easterly along Alexander avenue to Chase avenue, to Lee avenue, to Putnam avenue, to Chatterton Parkway, to Hawley street, to Trenton avenue, to Whitney street, to Battle avenue, to Harding avenue, to Chatterton avenue, to Central avenue, to the intersection of Central avenue, Russell street and County Center Road, and along County Center Road to the boundary line between the city of White Plains and the town of Greenburgh, thence westerly and southerly along the city line of the city of White Plains to the place of beginning.

Thirty-third. The thirty-third senate district shall consist of the counties of Orange and Rockland.

Thirty-fourth. The thirty-fourth senate district shall consist of the counties of Delaware, Greene, Sullivan and Ulster.

Thirty-fifth. The thirty-fifth senate district shall consist of the counties of Columbia, Dutchess and Putnam.

Thirty-sixth. The thirty-sixth senate district shall consist of the county of Albany.

Thirty-seventh. The thirty-seventh senate district shall consist of the counties of Rensselaer and Washington.

Thirty-eighth. The thirty-eighth senate district shall consist of the counties of Schenectady and Schoharie.

Thirty-ninth. The thirty-ninth senate district shall consist of the countries of Essex, Saratoga and Warren.

Fortieth. The fortieth senate district shall consist of the counties of Clinton, Franklin and St. Lawrence.

Forty-first. The forty-first senate district shall consist of the counties of Fulton, Hamilton, Herkimer and Montgomery.

Forty-second. The forty-second senate district shall consist of the county of Oneida.

Forty-third. The forty-third senate district shall consist of the counties of Lewis, Jefferson and Oswego.

Forty-fourth. The forty-fourth senate district shall consist of that part of the county of Onondaga within the city of Syracuse within and bounded by a line beginning at a point where Erie Boulevard intersects the east city line, thence westerly along Erie Boulevard to the easterly end of Lombard street, to Cherry street, to East Fayette street, to South Crouse avenue, to East Genesee street, to the intersection of East Genesee street and East Jefferson street, thence along East Jefferson street to the intersection of East Jefferson street and Montgomery street, thence along Montgomery street to East Onondaga street, to the intersection of West Onondaga street, South Clinton street and Gifford street, thence along Gifford street to South Wilbur avenue, to Tennyson avenue, to South Lowell avenue, to Tompkins street, to North Lowell avenue, to Ulster street, to West Fayette street, to Schuyler

street, to North Lowell avenue, to West Genesee street, to Emerson avenue, to Erie street, to Willis avenue, to Herkimer street, thence westerly along Herkimer street and Herkimer street extended to the west city line and northerly, easterly and southerly along said city line as it winds and turns to the place of beginning; together with the towns of Clay, Cicero, Camillus, Elbridge, Geddes, Lysander, Marcellus, Skaneateles, Salina and Van Buren.

Forty-fifth. The forty-fifth senate district shall consist of that part of the county of Onondaga within the city of Syracuse within and bounded by a line beginning at a point where Erie Boulevard intersects the east city line, thence westerly along Erie Boulevard to the easterly end of Lombard street, to Cherry street, to East Fayette street, to South Crouse avenue, to East Genesee street, to the intersection of East Genesee street and East Jefferson street, thence along East Jefferson street to the intersection of East Jefferson street and Montgomery street, thence along Montgomery street to East Onondaga street, to the intersection of West Onondaga street, South Clinton street and Gifford street, thence along Gifford street to South Wilbur avenue, to Tennyson avenue, to South Lowell avenue, to Tompkins street, to North Lowell avenue, to Ulster street, to West Fayette street, to Schuyler street, to North Lowell avenue, to West Genesee street, to Emerson avenue, to Erie street, to Willis avenue, to Herkimer street, thence westerly along Herkimer street and Herkimer street extended to the west city line and southerly, easterly and northerly along said city line as it winds and turns to the place of beginning; together with the towns of De Witt, Fabius, Lafayette, Manlius, Onondaga, Otisco, Pompey, Spafford, Tully; also the Onondaga Indian Reservation.

Forty-sixth. The forty-sixth senate district shall consist of the counties of Madison, Cortland, Chenango and Otsego.

Forty-seventh. The forty-seventh senate district shall consist of the county of Broome.

Forty-eighth. The forty-eighth senate district shall consist of the counties of Cayuga, Tompkins and Tioga.

Forty-ninth. The forty-ninth senate district shall consist of the counties of Steuben and Chemung.

Fiftieth. The fiftieth senate district shall consist of the counties of Wayne, Ontario, Seneca, Yates and Schuyler.

Fifty-first. The fifty-first senate district shall consist of that part of the county of Monroe within the city of Rochester within and bounded by a line beginning at a point where the Genesee River extended intersects the waters of Lake Ontario, thence southerly through the waters of the Genesee River to Avenue E, to Conkey avenue, to Avenue D, to Harris street, to Avenue A, to Gladys street, to Nielson street, to Harris street, to Clifford avenue, to Durgin street, to Evergreen street, to Conkey avenue, to Clifford avenue, to Clinton avenue North, to Westcott street, to St. Paul street, to Cumberland street, to Clinton avenue North, to Mortimer street, to Water street North, thence along Water street North and Water street South to Broad street, to the waters of the Genesee River and southerly through the waters of the Genesee River to Clarissa street, thence easterly along Clarissa street to Mt. Hope avenue, to Averill avenue, to South avenue, to Caroline street, to Goodman street South, to Richard street, to Wilcox street, to Monroe avenue, to

Canterbury Road, to Vassar street, to Harvard street, to Berkeley street, to Milburn street, to Culver Road, to Monroe avenue, to the city line, thence westerly, southerly and northerly along said city line as it winds and turns to the waters of Lake Ontario and through the waters of Lake Ontario to the Genesee River and the place of beginning; together with the towns of Chili, Clarkson, Gates, Greece, Henrietta, Hamlin, Ogden, Parma, Riga, Sweden, Wheatland and Rush.

Fifty-second. The fifty-second senate district shall consist of that part of the county of Monroe within the city of Rochester within and bounded by a line beginning at a point where the Genesee River extended intersects the waters of Lake Ontario, thence southerly through the waters of the Genesee River to Avenue E, to Conkey avenue, to Avenue D, to Harris street, to Avenue A, to Gladys street, to Nielson street, to Harris street, to Clifford avenue, to Durgin street, to Evergreen street, to Conkey avenue, to Clifford avenue, to Clinton avenue North, to Westcott street, to St. Paul street, to Cumberland street, to Clinton avenue North, to Mortimer street, to Water street North, thence along Water street North and Water street South to Broad street, to the waters of the Genesee River and southerly through the waters of the Genesee River to Clarissa street, thence easterly along Clarissa street to Mt. Hope avenue, to Averill avenue, to South avenue, to Caroline street, to Goodman street South, to Richard street, to Wilcox street, to Monroe avenue, to Canterbury Road, to Vassar street, to Harvard street, to Berkeley street, to Milburn street, to Culver Road, to Monroe avenue, to the city line, thence easterly and northerly along said city line as it winds and turns to the waters of Lake Ontario and through the waters of

Lake Ontario to the Genesee River and the place of beginning; including the towns of Brighton, Mendon, Penfield, Perinton, Pittsford, Webster and Irondequoit.

Fifty-third. The fifty-third senate district shall consist of the counties of Livingston, Allegany, Wyoming, Genesee and Orleans.

Fifty-fourth. The fifty-fourth senate district shall consist of the county of Niagara.

Fifty-fifth. The fifty-fifth senate district shall consist of that part of the county of Erie within the city of Buffalo within and bounded by a line beginning at a point where Delaware avenue intersects the north city line, thence southerly along Delaware avenue to Hertel avenue, to Colvin avenue, to Linden avenue, to Delaware avenue, to Knox avenue, to Edgepark avenue, to Amherst street, to Meadow Road, to Middlesex Road, to Delaware avenue, to West Delevan avenue, to Main street, to Masten avenue, to Woodlawn avenue, to Chester street, to Glenwood avenue, to Masten avenue, to Laurel street, to Jefferson avenue, to Best street, to Herman street, to the intersection of Herman street, Genesee street and High street, thence along High street to Fox street, to Genesee street, to Monroe street, to Beckwith street, to Adams street, to Broadway, to Monroe street, to Peckham street, to Adams street, to Howard street, to Monroe street, to Clinton street, to Madison street, to East Eagle street, thence westerly along East Eagle street to Oak street, to Clinton street, to Ellicott street, to East Eagle street, to Main street, to Erie street, to Franklin street, to Church street, to the intersection of Church street, Upper and Lower Terrace and Mechanic street, thence along Lower Terrace to Charles street, to Perry Boulevard, to Erie street,

thence along Erie street and Erie street extended to the waters of Buffalo Harbor and northerly through the waters of Buffalo Harbor and the Niagara River to a point where the north city line extended intersects the waters of the Niagara River, thence easterly along said city line extended and said city line to the place of beginning, including Squaw Island and Bird Island Pier Park; together with the towns of Grand Island and Tonawanda; also including the city of Tonawanda.

Fifty-sixth. The fifty-sixth senate district shall consist of that part of the county of Erie within the city of Buffalo within and bounded by a line beginning at a point where Delaware avenue intersects the north city line, thence southerly along Delaware avenue to Hertel avenue, to Covin Avenue, to Linden avenue, to Delaware avenue, to Knox avenue, to Edgepark avenue, to Amherst street, to Meadow Road, to Middlesex Road, to Delaware avenue, to West Delevan avenue, to Main street, to Masten avenue, to Woodlawn avenue, to Chester street, to Glenwood avenue, to Masten avenue, to Laurel street, to Jefferson avenue, to Best street, to Herman street, to the intersection of Herman street, Genesee street and High street, thence along High street to Fox street, to Genesee street, to Monroe street, to Beckwith street, to Adams street, to Broadway, to Monroe street, to Peckham street, to Emslie street, to William street, to Stanton street, to Peckham street, to Smith street, to Clinton street, to Babcock street, to Dorothy avenue, to Scoville avenue, to Clinton street, to Willet street, to Griswold street, to the east city line, thence northerly and westerly along said city line to the place of beginning; together with the town of Cheektowaga.

Fifty-seventh. The fifty-seventh senate district shall consist of that part of the county of Erie within the city of Buffalo within and bounded by a line beginning at a point where Griswold street intersects the east city line, thence westerly along Griswold street to Willet street, to Clinton street, to Scoville avenue, to Dorothy avenue, to Babcock street, to Clinton street, to Smith street, to Peckham street, to Stanton street, to William street, to Emslie street, to Peckham street, to Adams street, to Howard street, to Monroe street, to Clinton street, to Madison street, to East Eagle street, thence westerly along East Eagle street to Oak street, to Clinton street, to Ellicott street, to East Eagle street, to Main street, to Erie street, to Franklin street, to Church street, to the intersection of Church street, Upper and Lower Terrace and Mechanic street, thence along Lower Terrace to Charles street, to Perry Boulevard, to Erie street, thence along Erie street and Erie street extended to the waters of Buffalo Harbor and southerly through the waters of Buffalo Harbor and Lake Erie to a point where the south city line extended intersects the waters of Buffalo Harbor, thence easterly and northerly along said city line extended and said city line to the place of beginning; together with the city of Lackawanna and the towns of Amherst, Clarence, Newstead, Lancaster, Alden, West Seneca, Elma, Marilla, Hamburg, Orchard Park, Aurora, Wales, Evans, Eden, Boston, Colden, Holland, Brant, North Collins, Collins, Concord and Sardinia; also that part of the Cattaraugus Indian Reservation and that part of the Tonowanda Indian Reservation within the county of Erie.

Fifty-eighth. The fifty-eighth senate district shall consist of the counties of Chautauqua and Cattaraugus.

§ 122. Present assembly districts

The assembly districts of this state, as existing immediately before the enactment of this article, shall continue to be the assembly districts of the state until the expiration of the terms of the members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations and except for the election of delegates to a state or judicial district convention; members of a state committee, members of a county committee or any other party office or position, and any public office to be filled for a term or terms commencing on or after or to continue beyond January first, nineteen hundred fifty-five.

§ 123. Apportionment of members of assembly

Except as provided in section one hundred twenty-two, the number of members of assembly of this state hereafter to be chosen in the several counties thereof shall be as follows:

In the county of Albany, two.
In the county of Alleghany, one.
In the county of Bronx, twelve.
In the county of Broome, two.
In the county of Cattaraugus, one.
In the county of Cayuga, one.
In the county of Chautauqua, one.
In the county of Chemung, one.
In the county of Chenango, one.
In the county of Clinton, one.
In the county of Columbia, one.
In the county of Cortland, one.
In the county of Delaware, one.

In the county of Dutchess, one.
In the county of Erie, eight.
In the county of Essex, one.
In the county of Franklin, one.
In the counties of Fulton and Hamilton, one.
In the county of Genessee, one.
In the county of Greene, one.
In the county of Herkimer, one.
In the county of Jefferson, one.
In the county of Kings, twenty-two.
In the county of Lewis, one.
In the county of Livingston, one.
In the county of Madison, one.
In the county of Monroe, four.
In the county of Montgomery, one.
In the county of Nassau, six.
In the county of New York, sixteen.
In the county of Niagara, two.
In the county of Oneida, two.
In the county of Onondaga, three.
In the county of Ontario, one.
In the county of Orange, two.
In the county of Orleans, one.
In the county of Oswego, one.
In the county of Otsego, one.
In the county of Putnam, one.
In the county of Queens, thirteen.
In the county of Rensselaer, one.
In the county of Richmond, two.
In the county of Rockland, one.
In the county of St. Lawrence, one.
In the county of Saratoga, one.
In the county of Schenectady, one.

In the county of Schoharie, one.
In the county of Schuyler, one.
In the county of Seneca, one.
In the county of Steuben, one.
In the county of Suffolk, three.
In the county of Sullivan, one.
In the county of Tioga, one.
In the county of Tompkins, one.
In the county of Ulster, one.
In the county of Warren, one.
In the county of Washington, one.
In the county of Wayne, one.
In the county of Westchester, six.
In the county of Wyoming, one.
In the county of Yates, one.

§ 124. New assembly districts

The supervisors in each of the aforesaid counties, which are by the provisions of this article entitled to more than one member of assembly, shall meet on the fifteenth day of December nineteen hundred fifty-three, or on such other date as they shall determine but not later than the fifteenth day of March, nineteen hundred fifty-four at the place where their last meeting was held; organize by appointing one of their number as chairman and another as secretary; and proceed to divide such county into as many assembly districts as it is entitled to members of assembly. In any case where, prior to the effective date of this act, the supervisors of any such county have met on a date other than the fifteenth day of December, nineteen hundred fifty-three, organized and divided their county into assembly districts, all of the acts and proceedings of said supervisors in so meeting, organizing and

dividing such county into assembly districts are hereby validated, ratified and confirmed.

In order to facilitate the division of such counties into assembly districts, there shall be made available to the supervisors of such counties by the joint legislative committee on reapportionment created by the legislature by resolution adopted March twenty-ninth, nineteen hundred forty-nine and extended from time to time by resolutions duly adopted, information, data, statistics and maps in the possession of said joint legislative committee on reapportionment and pertinent to the division of such counties into assembly districts provided, however, that original maps prepared by the joint legislative committee on reapportionment and original data and statistics furnished the joint legislative committee on reapportionment by the United States bureau of the census shall at all times remain in the possession and under the control of the joint legislative committee on reapportionment. The accuracy of such information, data, statistics and maps shall be certified by the chairman of the joint legislative committee on reapportionment or by such member of said committee's staff as he may designate for that purpose.

The supervisors of each such county shall thereupon make a certificate in duplicate containing a description of each assembly district in the county, and specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the nineteen hundred fifty federal census.

In any city comprising one or more counties in which there is no board of supervisors, the members of the council of said city shall constitute a board for the division of the counties in such city into assembly districts; meet at the same time and in the same manner organize;

and make such divisions in said counties and certificates as boards of supervisors in other counties are required to do.

Each certificate shall be signed by a majority of such supervisors respectively, except in cities comprising one or more counties in which there is no board of supervisors, and in such cities by a majority of the council of each said city. The supervisors or councilmen shall cause duplicate certificates to be filed in the office of the secretary of state and in the office of the clerk of the respective counties.

In any case where, after the supervisors of a county or the members of the council of a city comprising one or more counties in which there is no board of supervisors have met but before they have completed the division of such county or counties into assembly districts, new supervisors or new members of the council of such city have been elected and have taken office, such new supervisors or new members of the council of such city shall meet, organize and shall complete the division of such county or counties into assembly districts and shall meet and sign the certificate or certificates as herein provided.

APPENDIX B

HISTORICAL SUMMARY OF PRIOR APPORTIONMENT PROVISIONS[1]

Four constitutions preceded the 1894 constitution containing the presently effective apportionment formula.[2]

The Constitution of 1777 established a Senate of 24 members, divided the State into four great senatorial districts and distributed the Senators among them, giving nine to the southern, six to the middle, six to the western and three to the eastern districts. The constitution provided for a census of Senate electors to be taken as soon as possible after the expiration of seven years following the end of the Revolutionary War and directed the legislature to reapportion the Senators among the districts so that the number of Senators would be "justly proportioned" to the number of electors in each district. N. Y. Const., Art. XII (1777).

The 1777 Constitution set the size of the Assembly at 70 and apportioned the 70 members among the various counties. N. Y. Const., Art IV (1777). As in the case of the Senate, the constitution also provided for a census of Assembly electors and directed the legislature to reapportion the Assemblymen among the counties so that the number of Assemblymen would be "justly proportioned" to the number of electors in each county. N. Y. Const. Art. V (1777).

In 1791, following the first census, the Senate districts were altered and the seats were reapportioned. N. Y. Sess. Laws 1791, ch. 4. The legislature was also author-

1. A detailed analysis of the history of New York's apportionment will be found in Silva, *Apportionment in New York*, 30 FORD. L. REV. 581, 597-603 (Senate) (1962); Silva, *Apportionment of the New York Assembly*, 31 FORD. L. REV. 1, 2-13 (1962).

2. See p. 24, fn. 12, *supra*, for a summary of the changes which have been made in the formula since 1894. None of these has made any basic change in the apportionment procedures.

ized to give an additional Senator to a district whenever a septennial census showed that the number of electors in that district had increased 1/24th part of the whole number of electors as established by the first census.[3] Consequently, after the second census, the Senate was increased to 43 members, the districts redrawn, and the Senators apportioned to the four newly constituted districts.

The Assembly was also reapportioned in 1791 and the legislature was authorized to give an additional Assemblyman to a county whenever a septennial census showed that the number of electors in that county had increased 1/70th part of the whole number of electors as established by the first census. Similarly, the legislature was empowered to deprive a county of one Assemblyman if that county's electors declined 1/70th part of the whole.[4]

In 1796, legislation was enacted providing for 38 additional Assemblymen making a total of 108. N. Y. Sess. Laws 1796, ch. 19.

In 1801, a constitutional amendment fixed the number of Senators at 32 and fixed the number of Assemblymen at 100 and directed the legislature to apportion the Senators among the four districts "as nearly as may be,

3. N. Y. Const., Art. XII (1777). Senate electors were "the freeholders of this State, possessed of Freeholds of the value of one hundred pounds over and above all Debts and Incumbrances thereon." 1 Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 516 (1906). See also Dougherty, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 50-51 (2d rev. ed. 1915).

4. N. Y. Const., Art. V (1777). Assembly electors included all freemen in the cities of New York and Albany, owners of freeholds valued at twenty pounds or more, and tenants who paid an annual rent of at least forty shillings. N. Y. Const., Art. VII (1777).

according to the number of electors qualified to vote for Senators" and to apportion the 100 Assembly seats among the counties as nearly as may be, according to the number of their respective electors. This amendment further provided that the number of Assemblymen should be increased at the rate of 2% per year until there was a total of 150 members.

Study of the first constitution, the amendment of 1801, and the 6 apportionment acts passed thereunder shows that the legislature did not divide a multi-member county into Assembly districts. A county entitled to more than one Assemblyman served as one multi-member district, in which all of the county's Assemblymen were elected at large. 3 Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 152-159 (1906). The legislature also created a number of joint districts composed of "two" but never more than "two" counties.

The Constitution of 1821 continued the number of Senators at 32 but increased the number of Senatorial districts from 4 to 8, and, by assigning 4 seats to each district, deprived the legislature of its authority to apportion Senators among the districts. N. Y. Const., Art. I, §5 (1821). This was apparently designed to limit the temptation of the gerrymander. See Griffith, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 97, 123 (1907). The legislature was authorized, however, to redistrict at the first session after each decennial census so "that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, paupers, and persons of colour not taxed". N. Y. Const., Art. I, §6 (1821).

The 1821 Constitution provided three new rules for Assembly apportionment. First, by stating that members

of the Assembly shall be chosen by counties, the second constitution at least implied that no county could be combined with another to form a joint district. Although Hamilton was combined with Montgomery under the apportionments of 1822, 1826 and 1836 and with Fulton under the apportionment of 1846, every other county enjoyed separate representation while the constitution of 1821 was in force. Second, although no other county could be created unless its population was sufficient to entitle it to an Assemblyman, every existing county was guaranteed one Assemblyman regardless of how much its representative population might fall below the ratio. The size of the Assembly was frozen at 128 members.

The Constitution of 1821 also changed the basis of representation for both the Senate and Assembly from electors to "inhabitants, excluding aliens, paupers, and persons of colour, not taxed". The legislature was directed to apportion the 128 seats among the various counties on the basis of the federal census of 1820, but the constitution provided that a state enumeration should be made in 1825 and every 10 years thereafter. At its first session after the return of each decennial enumeration, the legislature had the duty of reapportioning the 128 seats among the several counties, "as nearly as may be, according to the numbers of their respective [representative] inhabitants." N. Y. Const., Art. 1, §7 (1821). These constitutional provisions for Assembly apportionment remained in force with only minor modifications until superseded by the Constitution of 1894.

The legislature passed three laws redistricting the Senate under the second constitution, one in 1826, one in 1836 and another in 1846. From the standpoint of population as a basis of representation, the Senate dis-

tricts were drawn quite equitably—probably as equitably as possible since the districts had to be composed of contiguous territory and since counties could not be split between districts. While these two rules may have limited or prevented gerrymandering, they also prevented the legislature from creating districts that were precisely equal in population. As in the case of the prior constitution, there seems to have been no discrimination against the downstate districts in favor of the more rural areas. See Silva, *Apportionment in New York*, 30 FORD. L. REV., 581, 600, fn. 112.

The Constitution of 1846 departed from the then traditional rule by providing for a single-member rather than multi-member districts.

With respect to the Assembly, the Constitution of 1846 expressly provided for combining Hamilton with Fulton in a joint district until Hamilton County's representative population became equal to the ratio, which was obtained by dividing the State's representative population by 128. An amendment adopted in 1847 broadened the basis of representation to "inhabitants, excluding aliens", and transferred the power to divide New York City into Assembly districts from the New York County Board of Supervisors to the New York City Board of Aldermen.

Although the 1846 constitution provided that each Senatorial district should contain, as nearly as may be, an equal number of representative inhabitants, there were greater population differences between the districts created by these statutes than there had been under previous constitutions. See Silva, *Apportionment in New York*, 30 FORD. L. REV. at 601, fn. 119. These population differences, however, resulted from districting rather than from malapportionment.

The variations between the populations of Senate districts under the constitutions preceding that of 1894 were not especially severe nor did they consistently operate to the disadvantage of one particular area or group of voters. For example, under the apportionments enacted pursuant to the 1821 Constitution, the ratio between the highest and lowest population-per-seat figure never exceeded 1.2 to 1. Under the 1846 constitutional provisions, this ratio ranged from 1.5 to 1 to 1.8 to 1. By contrast, the present constitution has produced variations of up to 2.3 to 1, and will, in the pending apportionment, produce a variation of at least 2.5 to 1.

The disparities in the Assembly too, in the earlier years, did not approach those of recent decades. Under the apportionment of 1791, for instance, the ratio between the extreme figures was only 2.2 to 1. Under the pending apportionment, on the other hand, this ratio will be 12.7 to 1.

APPENDIX C

The Constitutional Convention of 1894

The record of proceedings of the Constitutional Convention of 1894 confirms what is evident from both the language of the apportionment formulae adopted by that convention and the consequences thereof—that it was the purpose and intent of the convention to discriminate in the apportionment of the legislature against urban residents, specifically those in New York and Kings counties (which counties then comprised New York City). For example, speaking in favor of the Senatorial apportionment formula, Henry J. Cookinham, delegate from Utica, stated:

> "• • • I say without fear of contradiction, successful contradiction, that the average citizen in the rural district is superior in intelligence, superior in morality, superior in self-government, to the average citizen of the great cities. • • • I know what the culture of the great cities is. But I know, furthermore, that the lower strata of society in the great cities is such that when the balance is struck, and the average citizen is produced, he is not a citizen so well worthy of confidence as the average citizen in the rural districts. The stream will never be purer than the fountain, and the government is founded upon the average citizen and not the cultured and wealthy classes.
>
> "If, then, the average citizen in the rural districts is a superior citizen to the average citizen of the great cities, your government will be better, your government will be safer in his hands than in the hands of the average citizen of the great cities. • • • I tell you, gentlemen, you who represent that great city, that when that time comes, when your streets are filled with those who defy the law, when

> socialists, when those who believe in no government, are parading your streets and destroying your property and killing your citizens, then you will cry for help. And to whom? You will then turn your eyes to the green fields of Oneida and Herkimer and Jefferson and St. Lawrence. You will call to us, who have no Emma Goldburgs and no Herr Mosts, and you will expect us to respond to the call, and we will * * *." 4 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF 1894 OF THE STATE OF NEW YORK, pp. 10-11 (1900) (hereafter cited "REV. REC.")*.

Edward Lauterbach (delegate at large) urged:

> "* * * that not only the population composed of many who were unfitted for citizenship but territory upon which live thousands of men not as great in number, but of greater force and power, and greater intellect, should also be represented; and that is the scheme of this apportionment. * * *" *Id.* at p. 87.

Tracy C. Becker, Chairman of the Committee on Legislative Organization on Reapportionment of Senate and Assembly Districts, delegate from Buffalo, explained the work of the Committee as follows:

> "* * * we have provided so that this vast influx of population, a very large proportion of which comes by immigration into our great cities of the State, while it will not be below its representation on the basis of the city being a political entity, a business entity, a commercial entity, will at the same time not injustly and wrongfully affect the representation of the rural districts, where there are several counties, each one of them equally a business entity, a political entity, a commercial entity, with any of the great city counties, and deprive those counties of their just and full representation" (3 REV. REC. 1000).

*For a 1962 version of the foregoing viewpoint, see p. 42, fn. 33, *supra*.

Delegate George H. Bush, from Ulster, protested that:

> "* * * it is openly stated by the majority of the committee that the purpose of the committee was to prevent the cities from getting the apportionment to which they were entitled, and to give it to the country districts, and this work does it beautifully. * * *"
> * * * So that you see, under this beautiful scheme, which seeks nothing but fairness, that while 35,500 population elect a Republican Member of Assembly, it takes 40,566 to elect a Democratic Member of Assembly; and yet, there is nothing of the gerrymander about it, and it is put into the Constitution to prohibit wicked Legislatures from ever gerrymandering the State, * * *" (3 Rev. Rec. p. 1009.)

The Assembly

The Constitution of 1894 divided the counties into three classes with respect to Assembly reapportionment. N. Y. Const., Art. III, §5; see pp. 30-31, *supra*. The division of counties into three groups according to population was originally proposed by Edward Lauterbach, 3 Lincoln, The Constitutional History of New York, 211 (1906), who made explicit at the Convention his view that the cities contained "many who were unfitted for citizenship". See p. 132, *supra*.

The three-class scheme was defended by John I. Gilbert (delegate at large) who argued that the cities have "an undue preponderance in the Legislature". 3 Rev. Rec. 1074.

Delegate DeLancey Nicoll of New York City attacking the system, pointed to the:

> "* * * ingenious classification and division of counties for the purpose of maintaining the prestige of the agricultural districts and subordinating the population to territorial representation * * *." 4 Rev. Rec. 15.

William C. Osborn said that each of the rules of Assembly apportionment had been proposed in order to "maintain the present balance and preponderance of the rural counties of this state against the city". 3 Lincoln, *supra*, at 224.

The measure relating to apportionment of the Assembly was amended by Charles Z. Lincoln, delegate from Little Valley, and was passed by the Convention in the form found in the Constitution today. 4 Rev. Rec. 675, 694; 5 Rev. Rec. 743.

The Senate

The rule that "no county shall have four or more senators unless it shall have a full ratio for each senator" (see p. 29, *supra*) is derived from the proposal introduced by Elron R. Brown of Jefferson County, 3 Lincoln, *supra*, at pp. 215-216, as amended by the clause recommended by the Chairman of the Committee on Legislative Organization, Tracy C. Becker. 4 Rev. Rec. 61. The Committee on Legislative Organization changed Brown's proposal so that it read:

> "An additional Senator shall not be apportioned to any county on less than one-half the ratio, nor shall an additional Senator be apportioned to any county on less than the full ratio when the average number of inhabitants, excluding aliens, in the districts in such county would not otherwise be one-tenth more than the ratio." 4 Rev. Rec. 56-57.

Stephen S. Blake of New York City objected to the one-tenth rule and argued that:

> "They have, in order to prevent New York and Kings from ever * * * obtaining a fraction of the rights of which they have been thus robbed, cunningly contrived [the rule] * * *." 3 Rev. Rec. 1178.

Delegate John I. Gilbert argued in support of the proposal:

> "* * * it would be a sad day * * * when that city (New York) and the city of Brooklyn, if they should be united, should have one-half of the representation in the Legislature of the State * * * the coming of that day, if it should ever come, would be to the disadvantage of the best interests of the State of New York." 4 REV. REC. 93-94.

The Brown plan with the Becker amendment to the clause adopted by the Committee was designed to limit the Senatorial representation of New York and Kings counties by preventing the apportionment of Senators on fractions to all counties having more than three ratios and is essentially the form found in the constitution today. See App. A, p. 78 *supra*.

Almet F. Jenks, delegate from Brooklyn, stated to the assembled delegates that:

> "* * * We ask simply that every man in the State have equal representation. * * * Every man in the State that has less representation, or right of representation, than any other, is deprived of his inherent right." *Id.* at pp. 28-29.

Becker had proposed that:

> "Every county having four or more senators shall have a full ratio for each senator. * * *" *Id.* at p. 61.

This substitution was made in response to objections of John I. Gilbert and others who feared that the large cities would have undue representation in the legislature. Delegate Gilbert had argued that:

> "I cannot look with complacency upon the fact that a little territory in the southern part of the State is likely to have in the near future a preponderance in the legislation of this State." 3 REV. REC. 1075.

After a discussion of the effect that the original Becker amendment would have on the proposed consolidation of New York, Kings, Richmond, and parts of Queens and Westchester, 4 REV. REC. 82-83, Charles Z. Lincoln proposed a change which was supposed to avoid embarrassing New York and Brooklyn and which provided that:

> "No county shall have more than one-third of all the Senators, and no two counties of the territory thereof as now organized, which are adjoining counties or which are separated only by public waters, shall have more than half of all the Senate." *Id.* at p. 357.

The effect that these latter two limitations might have on New York City's representation did not pass unnoticed. Wright Holcomb, delegate from New York City, argued against the Lincoln amendment:

> "This is not the result of chance, but the work of design. The proof of that is conclusive. In the cities the representation is less than the proportion of voting population, and in the rural districts it is greater. This is because the former are Democratic and the latter are Republican. It is even provided that no city shall ever have more than a third of the number of Senators, though its population might entitle it to half. This is aimed at New York, which is a rapidly growing city with a large Democratic majority." *Id.* at p. 361.

Delegate Jenks pointed out that:

> "* * * never can the population of those two cities (New York and Brooklyn) have representation of

> the individuals; in other words, you are writing into your Constitution a limitation upon the representation of the person, and you are virtually providing for taxation without representation." *Id.* at p. 375.

Gilbert protested that the Brown-Becker-Lincoln amendment provided for a possible contingency in which the cities of New York and Brooklyn would have representation in the legislature equal to the entire balance of the State, and that the proposal was therefore inadequate. 4 REV. REC. 374.

Elihu Root argued that New York City's limited representation was justified because "representatives from one city * * * represent not, in fact, their separate districts, but the whole city * * * were responsible to the same political organization * * * represented but one combined interest of the citizens of that city * * * [this amendment] goes but a small ways towards equalization." 3 REV. REC. 1224.

Stephen S. Blake, delegate from New York City, asserted that:

> "* * * your committee proposes to cheat the cities of their fair and just representation by the sophistical and dishonest plea that each Senator from one of these counties represents in a broad sense—in a broad sense, mark you the word, sir—in a broad sense the county, and, therefore, the rule works no injustice. * * *". 3 REV. REC. 1174-75.

Lincoln's proposed amendment was adopted by the Convention by a vote of 90 to 50, 4 REV. REC. 376, and today embodies two of the three mandatory rules on the apportionment of Senators to be found in the Constitution. N. Y. Const. Art. III, §4.

The Constitution now provides that: "The senate shall consist of fifty members, except as hereinafter provided * * *." N. Y. Const., Art. III, §2. The increase in the Senate size from 32 (see p. 126, *supra*) to a minimum of fifty members was recommended by the Committee on Legislative Organization. 5 Rev. Rec. 711. George H. Bush, delegate from Ulster, opposed this increase. 3 Rev. Rec. 1007. He noted that:

> "* * * The political division under this (50 member senate) will give about twenty-eight or twenty-nine Republicans to twenty-one or twenty-two Democrats. And know you now why they take fifty * * *." *Id.* at p. 1008.

Bush indicated an awareness of the unfairness to New York City inherent in the proposals by Becker and Lincoln, which are now contained in Art. III, § 4 of the Constitution. App. A, *supra*, p. 76.

Bush pointed out:

> "(The proposal) will not, in any way, change the county districts. In other words, this scheme contemplates simply that the present apportionment may always remain, but you may add on to a district when it has sufficient to give it another Senator * * *. The effect, then, is to substitute government by the Republican party for a republican form of government * * * and, in effect, have said that a majority of the people shall no longer rule the State of New York." 4 Rev. Rec. 648-649.

Delegate Mulqueen from New York City argued:

> "The workingmen and women of the State reside principally in the cities and you are arranging the Senate and Assembly districts so that the country

> will control the cities and so that a minority of the people will enact laws for the government of the majority * * *. The basis of representation should be population and not land. And we do not hesitate to say that you are not doing justice to the cities * * *." *Id.* at pp. 23-25.

Delegate Jenks complained that:

> "* * * he (Mr. Lincoln) seeks to bring back into the policy of this State representation by the rotten borough system * * *." *Id.* at p. 28.

It is, perhaps, Delegate Bush who best characterized the disillusionment of the urban delegates in the proceedings of the 1894 Constitutional Convention when he predicted:

> "In case this should be adopted, a new principle is injected into the law-making power of the State, and henceforth the acres of the Adirondack wilderness will vote in the halls of the Legislature against the population of the great cities of the State." *Id.* at p. 691.